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IN THE

Supreme Court of the United States

October Term, 1975

No.

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Petitioners pray that a writ of certiorari issue to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, to review a judgment of that Court entered on March 11, 1975 (permission to appeal to the New York Court of Appeals was denied, May 13, 1975).

Opinions Below

The opinion of the Appellate Division is printed in Appendix A hereto, *infra,* p. 1a, and is reported at 47 A.D. 2d 180 and 365 N.Y.S. 2d 199.

The opinion of the court of first instance (Supreme Court of the State of New York, New York County) is printed in Appendix B hereto, *infra*, p. 5a, and is reported at 79 Misc. 2d 57 and 359 N.Y.S. 2d 176.

Jurisdiction

The judgment of the Appellate Division sought to be reviewed was entered March 11, 1974. Petitioners' timely motion for permission to appeal to the Court of Appeals was denied by the Appellate Division on May 13, 1975 (Appendix C, *infra*, p. 13a). Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Under the circumstances of this case, no appeal may be taken to the Court of Appeals, New York's highest court, without the permission of the Appellate Division. New York State Constitution, Art. 6, §3; New York Civil Practice Law and Rules, §5602(b)(1); *Dooley* v. *Carsen*, 15 N.Y.2d 908, 206 N.E.2d 651, 258 N.Y.S.2d 643 (1965). Accordingly, the judgment of the Appellate Division was rendered "by the highest court of a state in which a decision could be had" within the meaning of 28 U.S.C. §1257.[1]

With respect to finality, the posture of this case is similar to *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328 (1975), and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). As in those two cases, it is possible that petitioners here will prevail at the trial on state law grounds[2] thereby mooting the important consti-

1. See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 237 n.1 (1967); *Williams* v. *Florida*, 399 U.S. 78, 80 n.5 (1970). *Cf. Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963).

2. Petitioners maintain that the publication complained of is true and expect that a jury would agree.

tutional issues raised in this petition. But this result "would be intolerable" because delaying final decision of the First Amendment issues until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press," *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S., at 247, n.6, through "unwarranted restrictions on the press should the state court's constitutional judgment prove to be in error." *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed.2d, at 343, n.12. Most significantly, denial of certiorari "might seriously erode Federal policy" until a similar case can reach this Court some time in the future. 43 L.Ed.2d, at 342.[3]

Furthermore, as discussed at pp. 11-14 *infra,* petitioners contend that subjecting them to the expense and burden of a jury trial and of further appellate proceedings in the state courts infringes their federal constitutional rights and impermissibly chills the exercise of First Amendment freedoms by other publishers. See *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed. 2d, at 344: "[Petitioners] may prevail at trial on non-federal grounds, it is true," but if the court below erroneously denied petitioners' First

3. The pragmatic interpretation of the finality requirement under 28 U.S.C. §1291 where a Federal decision sought to be reviewed is "fundamental to the further conduct of the case" lends further support to a finding of finality here. See, *e.g., Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153-154 (1964); and see, generally, Redish, *"The Pragmatic Approach to Appealability in the Federal Courts",* 75 Colum.L.Rev. 89 (1975). See also *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949):

> "When that time ["final" judgment] comes, it will be too late effectively to review the present order . . . ."

Amendment rights "there should be no trial at all." The Appellate Division's judgment on this issue meets all tests of finality since it is not appealable to a higher state court, is binding on the trial court, and will not survive the remand to the trial court for purposes of further appellate review by the state courts or by this Court. *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed. 2d, at 341. In short, the result is effectively the entry of summary judgment against petitioners on the constitutional issues.

The case also meets the principles of finality set forth in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores,* 414 U.S. 156 (1973), in that there is no way that petitioners can preserve the constitutional issues short of intolerable delay and inordinate expense:

(a) The fact that petitioners may prevail on state grounds at the trial or post-trial appeal lends added support to finality since in that event "the battle over the [constitutional issue] will be lost as far as this case is concerned." 414 U.S., at 163.

(b) On the other hand, if petitioners lose at trial on state grounds, and then successfully appeal on federal constitutional grounds, a full second trial will be necessary (unless summary judgment is granted on such appeal). A second trial, at that stage, would "result in a completely unneccessary waste of time and energy in judicial systems already troubled by delays due to congested dockets," 414 U.S., at 160, quoting *Mills* v. *Alabama,* 384 U.S. 214, 217-8 (1966). Here, this Court's reversal of the Appellate Division could end the litigation.

If, for whatever reason, the federal issues raised in this petition are mooted, the fundamentally erroneous Appellate Division decision herein would stand as the New York State interpretation of the Constitution. This would indeed be "intolerable," particularly in the light of this Court's recent decision in *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975).

Questions Presented

1. Whether an advertisement by a newspaper containing material of clear public interest is automatically deprived of First Amendment protection solely because it has the "commercial" purpose of soliciting subscribers and purchasers.[4]

2. Whether, in a public official's action for libel and invasion of privacy complaining of an advertisement seeking broader dissemination of a newspaper by summarizing the newspaper's previously published article critical of the official's conduct in office, the First Amendment requires the plaintiff to establish knowing or reckless falsity as defined by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

3. Whether the First Amendment requires a public official to make a minimum evidentiary showing of knowing or

4. The decision below answered this question in the affirmative, holding that all commercial advertisements, regardless of their content or the nature of the product advertised, were outside the scope of First Amendment protection. Appendix A, *infra*, p. 3a. This Court's decision to the contrary in *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975), was announced after the decision below and after expiration of the time to seek rehearing in the court below. Accordingly, while petitioners would prefer that this Court reach the merits, an appropriate disposition of this petition would be to grant certiorari and remand to the Appellate Division for reconsideration in light of *Bigelow* v. *Virginia*.

reckless falsity before subjecting his critics to protracted defamation and privacy litigation, including a trial on the merits.

Statement

Petitioners are defendants in an action for libel and invasion of privacy[5] brought by a sitting Justice of the Supreme Court of the State of New York, based upon an advertisement (reproduced in Appendix D, *infra*, p. 14a) that summarized a news article published in *The Village Voice* critical of the judge's behavior in open court and his handling of narcotics cases, and referred to other articles critical of his judicial conduct published in *The New York Times* and *New York Magazine*.

The article, published in the *Voice* on August 31, 1972, was based on a reporter's investigation into judicial leniency toward reputed narcotics dealers and organized crime figures in New York. Petitioner Scali, McCabe, Sloves, Inc., a professional advertising agency, placed the advertisement in *The New York Times* on February 25, 1973 on behalf of petitioner The Village Voice, Inc. The advertisement called for greater public involvement in matters of questionable judicial conduct and explained the legally available remedies for judicial misconduct. It also emphasized that *The Village Voice* had published an important story several weeks before articles on the same subject—and the same judge—appeared in *The New York Times* and elsewhere; this was cited as an example of the *Voice's*

5. Respondent's amended complaint asserts two causes of action. The first is for libel. The second cause of action, brought pursuant to N.Y. Civil Rights Law §§50-51, is for invasion of privacy in the use of respondent's name and likeness.

superior investigative reporting and a reason for purchasing and subscribing to *The Village Voice*.

In the court of first instance, petitioners raised the first two questions presented here in their answers, which pleaded as affirmative defenses that the publication complained of concerned the performance of the judge's official duties and other important public matters, was published without malice and in the reasonable belief that it was true, and was therefore a privileged exercise of the freedom of the press guaranteed by the United States Constitution. After lengthy discovery, respondent moved to strike the First Amendment defenses and petitioners cross-moved for summary judgment on the First Amendment ground. Petitioners' papers and briefs on respondent's motion to strike also raised the first two questions presented here, and their motions for summary judgment raised all of the questions presented in this petition.

The court of first instance struck petitioners' First Amendment defenses and denied summary judgment. Petitioners appealed, raising the three questions presented here in their briefs and oral argument. The Appellate Division affirmed in the respects material here and denied petitioners' motion for permission to appeal to the Court of Appeals.

The court below, in holding the First Amendment defenses inapplicable to petitioners' advertisement, ruled that all commercial advertisements were unprotected by the First Amendment:

> "Freedom of the press has never been extended to commercial advertising matter (*Valentine* v. *Chrestensen*, 316 U.S. 52)." Appendix A, *infra*, at p. 3a.

Reasons for Granting the Writ

This petition raises crucial issues of the freedom of the press to criticize government officials and to comment upon matters of compelling public interest. The decision below seriously impedes the dissemination of news and commentary by imposing a judicial penalty on republication of constitutionally protected material in a newspaper's advertisements. The decision below also impairs the freedom of the press by departing from the constitutionally required standard of proof of knowing or reckless falsity and thus encourages frivolous, but still expensive and burdensome, suits by public officials against their critics.

I. The decision below is contrary to *Bigelow* v. *Virginia*.

As noted earlier, the decision below held that the First Amendment affords no protection whatever to commercial advertisements. This Court held the contrary in *Bigelow* v. *Virginia*, 44 L.Ed. 2d 600 (1975), which was announced after the decision below was rendered and after the time to move for reargument had expired.

As in *Bigelow*, the advertisement in this case "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'." 44 L. Ed.2d, at 612. Moreover, the "product" advertised in this case — a newspaper — is itself constitutionally protected, just as the activity advertised in *Bigelow* pertained to constitutional interests.

The advertisement in suit here contains far more traditional First Amendment matter than the one in *Bigelow*. It presents a newspaper's reportage and editorial position on the conduct of elected officials, the need for reforming New York's judiciary, and a plea for public participation in that reform. It also informs the pubic of the means available under New York law for disciplining or removing errant judges. *Cf.*, 44 L.Ed.2d, at 612 (informing public of a state's abortion laws).

In sum, *Bigelow* v. *Virginia* requires reversal of the decision below.

II. The ability of the press to disseminate news and commentary is unconstitutionally impeded by the decision below.

The decision below has had, and until overruled will continue to have, an immediate, substantial, and immeasurably deleterious impact on the ability of the press to disseminate constitutionally protected publications through advertising. As in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the constitutional uncertainty created by the Appellate Division's decision "restricts the present exercise of First Amendment rights," 418 U.S., at 247, n.6, by forcing publishers in practice to modify their historic method of advertising their publications with the unwelcome result of "reduc[ing] materially the flow of information and opinion which such advertisements represent." (Appendix G, *infra*, pp. 25a-26a.) A final and explicit resolution of the issues raised by this petition is urgently required to protect newspaper and book publishers who

have routinely reproduced portions of their publications in advertisements in the secure belief that the contents of such advertisements enjoy the same protection as the original publications themselves.[6]

This Court has consistently held that the First Amendment protects the circulation and dissemination of literature even though it is sold for profit. *Smith* v. *California*, 361 U.S. 147, 150 (1959) *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249 (1936); *Ex parte Jackson*, 96 U.S. 727, 733 (1878).[7] Advertising that exposes the public to the content and quality of books and periodicals is a traditional and vital part of the dissemination process and enables the press to perform its constitutionally assigned role in debate on public affairs. *Booth* v. *Curtis Publishing Co.*, 15 A.D. 2d 343, 223 N.Y.S. 2d 737 (1st Dep't), *aff'd*, 11 N.Y. 2d 907, 182 N.E. 2d 812, 228 N.Y.S. 2d 468 (1962).

The burden of the decision below falls most heavily upon those controversial books, pamphlets, and periodicals that might provoke retaliation. Many of these are fledgling publications that depend chiefly upon advertising to attract

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6. Both *The New York Times* and *The Wall Street Journal* have been advertised in other media by the reproduction of portions of their newspapers; indeed, *The Wall Street Journal* "from time to time has republished the entire front page of the Eastern Edition of The Wall Street Journal in the same day's edition of The New York Times." (Appendix G, *infra*, p. 24a.) Yet the necessary impact of the Appellate Division's clearly erroneous decision in the instant case is that the entire front page of *The Wall Street Journal* would be denied First Amendment protection simply by republication in a different paper.

7. See Mr. Justice Stewart, *"Or of the Press,"* 26 Hastings L. J. 631, 633 (1975):

> "[T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection."

an audience for their point of view. Even if their publishers are willing to run the risk of suits commenced by those who are angered by what they say, without constitutional protection, the newspapers, magazines, and radio and television stations that have heretofore carried their advertising may well refuse to do so, or at the very least may require their advertisements to be censored. Such censorship, of course, is antithetical to the Nation's commitment to robust debate on issues of public concern. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

III. To require a newspaper to defend protracted litigation, without requiring a constitutionally adequate showing of knowing or reckless falsity, violates First Amendment policy.

This Court has never considered whether the federal Constitution prohibits the states from permitting public officials to subject their critics to lengthy and costly litigation absent any preliminary showing of knowing or reckless falsity. However, the federal courts of appeal have recognized that the policy of fostering free, robust, and uninhibited debate, which was the premise of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-272 (1964), will not fully be realized if public officials can put their critics to the expense and burden of lengthy litigation culminating in a plenary trial. See *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir.), *cert. denied*, 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are . . . essential . . . . One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First

> Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes . . . ."

Accord, *Time, Inc.* v. *McLaney,* 406 F.2d 565, 566 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969):

> "[T]he failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L.Ed. 2d 22, because of the chilling effect of such litigation."

See, *e.g., Treutler* v. *Meredith Corp.,* 455 F.2d 255, 259 (8th Cir. 1972); *United Medical Laboratories* v. *Columbia Broadcasting System,* 404 F.2d 706, 712 (9th Cir.), *cert. denied,* 394 U.S. 921 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 863-7 (5th Cir. 1970); *Meeropol* v. *Nizer,* 381 F.Supp. 29, 32 (S.D.N.Y. 1974).

Hence, these cases held that First Amendment policy requires that a public official or figure proffer evidence sufficient to satisfy the constitutional standard of knowing or reckless falsity. *E.g., Washington Post Co.* v. *Keogh,* 365 F.2d, at 971; *Time, Inc.* v. *McLaney,* 406 F.2d, at 573. This evidence, read in the light most favorable to the plaintiff, must establish knowing or reckless falsity with "convincing clarity." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 275-6 (1964). It must indicate that the defendant actually entertained serious doubts as to the truth of the publication, *St. Amant* v. *Thompson,* 390 U.S. 727, 731

(1968), or was keenly aware of its probable falsity, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

Petitioners submit that the First and Fourteenth Amendments require the states to apply the same standard in pretrial proceedings to test the evidentiary sufficiency of a public official's action for defamation. Any other result would invite forum shopping between state and federal tribunals by plaintiffs in actions for defamation.

The Appellate Division applied a different and constitutionally inadequate standard. It apparently held that a public official's action for libel will survive a motion for summary judgment, and must proceed to a plenary trial, if the official adduces any *scintilla* of evidence that the defendant should have questioned the publication's accuracy. That this was the unarticulated standard adopted below is manifest from the one piece of evidence that was held to raise a triable issue: a letter (Appendix E, p. 16a, *infra*) to one of the petitioners that stated in general, conclusory terms that an October 12, 1972 *Voice* article about respondent and another judge contained unidentified statements that were inaccurate and incomplete. However, this letter did not point out any misstatement in the article, nor did it state any facts or identify any sources (or offer to supply them) to support the charge of inaccuracy. More importantly, the advertisement in suit here was based upon a *Voice* article of August 31, 1972, which prior to the publication of the advertisement in suit was never questioned, and not the October 12 article referred to in the letter.

The notion that such evidence could sustain a finding of knowing or reckless falsity is a complete abandonment

of the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

By applying an impermissibly lenient standard and permitting officials to subject their critics to expensive, protracted litigation without any evidence of knowing or reckless falsity, the decision below subjects the press to the harassment of unfounded lawsuits and requires publishers "to become self-censors." *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir.), *cert. denied*, 385 U.S. 1011 (1967). It is thus contrary to First Amendment policy and the teachings of *New York Times Co.* v. *Sullivan* and subsequent decisions by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the case set down for argument. In the alternative, the petition should be granted and the case remanded to the Appellate Division for further consideration in the light of *Bigelow* v. *Virginia*, 44 L.Ed. 2d 600 (1975).

Respectfully submitted.

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August 11, 1975.

Appendix A

Opinion Below

New York Supreme Court, Appellate Division,
First Judicial Department

Harold A. Stevens, J.P.,
Arthur Markewich,
Louis J. Capozzoli,
Emilio Nunez,
Paul J. Yesawich, Jr., JJ.

1760

DOMINIC S. RINALDI,

Plaintiff-Respondent,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

Appeals from an order of the Supreme Court (Tyler, J.) entered on September 18, 1974 in the New York County Clerk's office, granting plaintiff's motion to dismiss the affirmative defenses of defendants and denying defendants' cross-motion for summary judgment.

Victor A. Kovner of counsel (Nathaniel J. Bickford with him on the brief; Lankenau, Kovner, Bickford & Beer, attorneys) for defendant-appellant The Village Voice, Inc.

Steven Finell of counsel (Paul J. Newlon with him on the brief; Paul, Weiss, Rifkind, Wharton & Garrison, attorneys) for defendant-appellant Scali, McCabe, Sloves, Inc.

Irwin N. Wilpon, attorney for plaintiff-respondent

NUNEZ, J.

Defendants appeal from an order of Special Term granting plaintiff's motion to dismiss defendants' affirmative defenses and denying defendants' cross-motion for summary judgment. Defendant The Village Voice, Inc., publishes a newspaper called "The Village Voice". In its newspaper it published four articles between August 31, and November 30, 1972, which were highly critical of the plaintiff's performance of his duties as a judicial officer. It is not these articles, however, which are the gravamen for this action. On February 25, 1973, defendants caused an advertisement to be printed in the New York Times. The advertisement was composed by defendant Scali, McCabe, Sloves, Inc., a professional advertising agency. This advertisement referred to the articles about plaintiff in sufficient detail and in such a manner that there can be no question that if the statements made were not accurate and if the defendant enjoyed no privilege, the advertisement would support a cause of action for libel.

Defendants urge that under the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254, there is no issue as to their privilege. For two reasons we do not agree.

It is correct that *Sullivan* concerned a paid advertisement and the cloak of the First Amendment was nevertheless applied. But the court was careful to point out (at pp. 266, et seq.) the nature of the particular advertisement involved. It was not a commercial advertisement designed to sell a product. On the contrary, it sought financial support for a movement of great public interest and concern, and the court pointed out that the advertiser was doing

what a newspaper could do—exercising its freedom of speech. Not owning a newspaper, the advertiser could not state its views in the editorial section of a paper and so was relegated to a paid advertisement. Advertisements of this kind the court styled "editorial advertisements", and it is advertisements of like kind only that are protected by the constitutional amendment.

The advertisement in suit here was designed solely to sell The Village Voice, the product of the defendant advertiser. The composer of the advertisement, the defendant advertising agency, so claims. It would appear obvious that had the defendant Village Voice wished to convey information other than the desirability of purchasing its paper, it would have used its own columns. Freedom of the press has never been extended to commercial advertising matter (*Valentine* v. *Chrestensen*, 316 U.S. 52). At the very least the record presents an issue as to the character of the publication.

Even assuming the advertisement was privileged, the privilege would not survive a malicious publication. The record shows that between the date of the publication of the original article and the date of publication of the advertisement, the defendant Village Voice received information that its original publication was inaccurate, incomplete, and in many respects totally false. This information came from an apparently reliable source. Here again, an issue is presented precluding summary judgment.

Finally, The Village Voice's defenses of truth and both defendants' contentions that the advertisement was published without malice are sufficiently pleaded. The CPLR

requires only adequate notice of each cause of action or defense. Specific acts intended to be established in support of the pleaded defenses may be obtained by a bill of particulars and by disclosure. It was error to dismiss these defenses and they should be reinstated.

The order entered on September 18, 1974 in the Supreme Court, New York County (Tyler, J.) should be modified on the law so as to reinstate the first and second affirmative defenses and otherwise affirmed, without costs.

All concur.

Appendix B

Opinion of the Court of First Instance

New York Supreme Court, New York County

DOMINIC S. RINALDI,

Plaintiff,

against

THE VILLAGE VOICE, INC. and SCALI, MCCABE, SLOVES, INC.,

Defendants.

ANDREW R. TYLER, J.

This is an action by a public official for libel, and invasion of privacy under Civil Rights Law sections 50 and 51 arising from the publication of an advertisement which appeared in the New York Times on February 25, 1973. The advertisement was prepared by the defendant Scali, McCabe, Sloves, Inc. (Scali) under agreement with the defendant The Village Voice, Inc. (Voice) for the purpose of promoting sales of the New York newspaper known as The Village Voice. The advertisement depicted plaintiff in caricature under a headline "The judge bawled out the cop. And let the pusher go free." It contained statements pertaining to articles concerning the plaintiff which appeared in several publications of The Village Voice and which generally criticized his integrity in the performance of his duties as a justice of the Supreme Court in certain criminal cases. It described the plaintiff as "curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants, on

questions like bail, probation, and sentencing." It acclaimed the newspaper for resourcefulness and initiative in reporting and contained subscription coupons printed at the bottom to be used to buy The Village Voice.

The defendant Voice has interposed affirmative defenses asserting that the material described in the advertisement is of public interest, was published in good faith in the reasonable belief that it was true, without malice, and is constitutionally privileged.

The plaintiff claims the advertisement is purely commercial and moves to dismiss the defenses upon the ground that constitutional privilege with respect to public officials is not afforded to purely commercial material, and upon the further ground that the advertisement portrayed the caricature of the plaintiff for trade purposes without his consent and thereby violated his right of privacy under Civil Rights Law sections 50 and 51. The plaintiff also urges that the defenses of truth and privilege are not sufficiently stated.

The defendant Scali has similarly interposed a defense that the material was prepared by it without malice and in good faith in the belief that it was true and privileged under the Constitution of the United States.

The plaintiff moves to dismiss Scali's defense upon the grounds that the material Scali prepared was a commercial advertisement not constitutionally privileged.

In support of their contentions, the defendants urge, inter alia, that the advertisement is an editorial of news

items protesting official action rather than plain commercial activity in nature, and therefore is constitutionally privileged under the First Amendment to the U.S. Constitution. They further contend that plaintiff has not shown evidence of actual malice in the libel cause of action and that recovery in the second cause of action under the Civil Rights Law is limited by the requirement that statements concerning a public figure must demonstrate that the publication was materially and knowingly falsified, or was uttered with reckless disregard for the truth. The defendants cross-move for summary judgment upon grounds, inter alia, that the plaintiff has not offered proof of knowledge of falsity or reckless disregard as to the truth, and that the complaint fails to particularize the alleged libel as required by CPLR 3016 (a).

The first contention by plaintiff is that the constitutional guarantees of freedom of speech and of the press normally accorded to news media are inapplicable here, at least so far as Voice is concerned, because the allegedly libelous statements were published as part of a paid "commercial" advertisement.

It is well recognized that editorials on the dissemination of news are constitutionally protected. This is so, even if the editorial contains a protest against certain official actions. However, there is a distinction between a "commercial" message and a protest against certain official actions. If the protest message has been added to the "commercial" message, it does not serve to purify the publication but becomes tainted and takes the form of an effort to evade the law (Valentine v. Chrestensen, 316 U.S. 52). A publication is not "commercial" when it communicates in-

formation, expresses opinion, recites grievances, protests claimed abuses, and seeks financial support of its activities. (N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, See, NAACP v. Button, 371 U.S. 415, 435).

The rationale for concluding that an advertisement is not "commercial" is based upon the need to provide an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. (N.Y. Times Co. v. Sullivan, supra; cf. Lovell v. Griffin, 303 U.S. 444, 452; Schneider v. State, 308 U.S. 147, 164). In other words, criticism of a judge such as here, even if based upon half-truths and misinformation is constitutionally protected, as long as the statements are not embodied in a "commercial" advertisement. (N.Y. Times Co. v. Sullivan, supra, p. 273; cf. Bridges v. California, 314 U.S. 252; Pennekamp v. Florida, 328 U.S. 331).

A fair reading of the defendants' publication reveals that it is clearly intended to solicit continuing readership of The Village Voice newspaper. This solicitation is confirmed by the inclusion of coupons in the advertisement stating "* * * a year's subscription (52 issues) to the Village Voice, I enclose $7." The coupons show a domestic subscription rate of $12. for two years, $16. for three years and $8. for a foreign subscription. The addition of a protest message to the subscription coupons criticizing the performance of the plaintiff in his official duties does not serve to purify the publication but takes the disguised form of an effort to evade the law and thereby infects its

constitutional protection (Valentine v. Chrestensen, supra). Moreover, the defendant Voice, having access to its own publishing facilities, does not need to use the New York Times for the promulgation of information and ideas. It is not deprived of the right to exercise freedom of speech normally accorded to members of the press, since by its very nature it is possessed with its own important outlet for publication (N.Y. Times Co. v. Sullivan, supra). Thus, the statements made in the advertisement while ordinarily protected even if they were half-truths or based upon misinformation, are not privileged when embodied in a commercial advertisement (N.Y. Times v. Sullivan, supra). Accordingly, the third defense of the defendant Voice, relying upon this protection and the defense of the defendant Scali consonant therewith, are fatally deficient and must be stricken.

The plaintiffs urge that the first and second defenses contain a general statement, without facts, that the allegations in the advertisement were published without malice, in good faith, and in the belief that the same were true and with reasonable cause for such belief. A general allegation charging a person with something that is libelous per se cannot be successfully answered by a general allegation in the answer that the charge is true. A statement in the answer that the words are true would not be a justification; it is a statement of nothing. It is a simple repetition of the libel. See, Wachter v. Quenzor, 29 N.Y. 547, 552. The reason for the rule is that it does not give to the plaintiff any clue of what the defendant intends to prove upon the trial. The answer should set forth the facts upon which it is alleged that the allegations of the complaint are

true. Bingham v. Gaynor, 203 N.Y. 27, 34. The answer of the defendants does not set forth the facts.

As to the cause of action based upon Civil Rights Law sections 50 and 51, the Court is cognizant that the privacy of every individual is protected under the statute in that the name, portrait or picture of a living person may not be used for advertising or trade purposes without that person's prior written consent (section 50). The offended person may sue for injunctive, compensatory and exemplary damages (section 51). The statute, however, affords little protection to a newsworthy person unless the report or article is fictitious. No healthy interest is preserved by protecting dissemination of fiction. (Time, Inc. v. Hill, 385 U.S. 374, 387). The constitutional protections for speech and press preclude the application of the New York statute to redress false reports of public interest, unless there is proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. (Time v. Hill, supra., pp. 387, 388). Calculated falsehood enjoys no immunity in cases of alleged defamation of a public official concerning his official conduct, id., pp. 389, 390.

The use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event is not proscribed by Civil Rights Law section 51. The same is true with reference to a past newsworthy event if it bears some relationship to the current event portrayed. (Hill v. Hayes, 18 A.D. 2d 485, 490, aff'd, 15 N.Y. 2d 986). However, if it can be clearly demonstrated that the newsworthy item, even if true, is presented, not for

the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption should not apply. Consequently, a defense of qualified privilege is not a defense where it is demonstrated that the article was published for the sole purpose of enhancing sales; id., p. 491. The solicitation of subscriptions contained in the advertisement evinces a clear purpose of enhancing sales. The commercial message taints the publication as a disguised effort to evade the law. (Valentine v. Chrestensen, supra).

The moving and opposing papers contain an ample description of the underlying criminal cases upon which the news stories were based, from which the questionable advertisement was drawn. The contention by defendants that the complaint fails to particularize the libel is without merit since a complete copy of the allegedly libelous material is attached to the complaint as an exhibit. Notwithstanding the efforts of the litigants to be incisive and to elicit an expeditious remedy, the number of factual issues raised as to the truthfulness of the stories or their malicious use, are so sharp and diverse as to make summary disposition incapable. For example, whether the reporter for The Village Voice observed elemental standards of journalism is not determinable at this juncture since those standards are not clearly explained, nor can the truthfulness or malice of statements or knowledge thereof be readily ascertained from reading the papers.

Upon the foregoing, the motion in chief is granted by striking the defenses of defendant Voice, with leave to serve an amended answer within twenty days after service

of a copy of the order to be entered hereon, with notice of entry reasserting the second defense containing a statement of ultimate facts supporting the contention that the advertisement was published without malice (Bingham v. Gaynor, 203 N.Y. 27, 34).

The defense of the defendant Scali is dismissed and the cross motions are denied in all respects.

Settle order.

Appendix C

Order of the Appellate Division of the Supreme Court, First Judicial Department (May 13, 1975)

Present—

Hon. Harold A. Stevens, Presiding Justice,
Arthur Markewich,
Louis J. Capozzoli,
Emilio Nunez,
Paul J. Yesawich, Jr., Justices.

M-953

DOMINIC S. RINALDI,

Plaintiff-Respondent,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

The above named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on March 11, 1975,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the joint affidavits of Victor A. Kovner and Steven Finell, and the affidavits of James C. Goodale, Edward R. Cony and Edward A. Miller, respectively, in support of said motion, the affidavit of Irwin N. Wilpon in opposition thereto, and after hearing Messrs. Victor A. Kovner, Steven Finell and Edward A. Miller for the motion, and Mr. Irwin N. Wilpon opposed,

It is ordered that said motion be and the same is hereby denied with $20 costs.

ENTER:

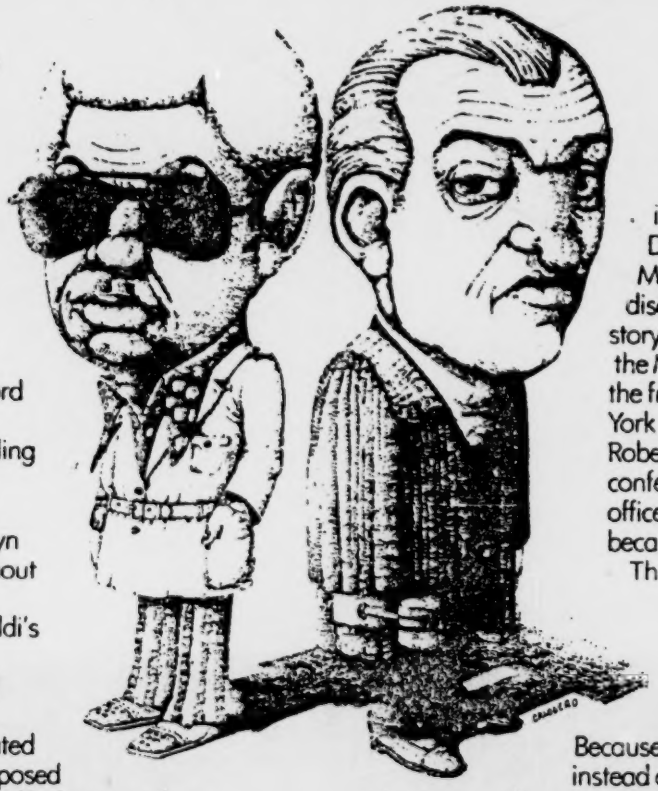
HYMAN W. GAMSO
Clerk.

Appendix D

The Advertisement in Suit

(See Opposite ☞)

The judge bawled out the cop. And let the pusher go free.



The pusher's crimes against society are widely known.

But the judge's activities against society aren't.

The facts are alarming.

That's why The Village Voice decided to bring them before the public.

We broke Jack Newfield's story in August, several weeks before any other publication.

A heroin pusher with a record of 18 arrests and assorted convictions was charged with selling heroin and attempting to bribe a police officer.

Justice Rinaldi of the Brooklyn Supreme Court released him without bail.

But even stranger than Rinaldi's handling of the pusher was his handling of the cop who arrested the pusher.

Rinaldi yelled at and humiliated the cop...in effect abusing the supposed bribee while allowing the supposed briber to go free.

Strange behavior for a man supposed to be meting out justice?

It gets stranger. Justice Rinaldi has a whole record of curious behavior, as the New York Times and New York Magazine reported in their studies several weeks later.

Curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants, on questions like bail, probation and sentencing.

Obviously Rinaldi is not the only questionable judge in New York. Our judicial system could be riddled with them.

There are several ways to eliminate such judges. First of course, by voting them out of office. Then through criminal indictment and trial, impeachment by the State Legislature or trial on competency by a judicial court.

And the only way any of those can happen is if people start causing an uproar.

We applaud the New York Times study. But we're even prouder that The Village Voice spoke out first.

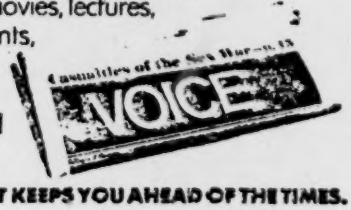
In fact, that's why our readers read The Voice.

Take the now-famous investigation of Queens District Attorney Thomas Mackell. The day following the disclosure of Joseph Ferdinando's story in the August 3rd Voice, the Mackell investigation was on the front page of all three New York dailies. And U.S. Attorney Robert Morse held a press conference to announce his office's investigation of Mackell because, as he said, The Voice was about to break the story.

You can find stories like these (and follow-up reports) every week in The Village Voice. Because we go out and find the news instead of just waiting to report it.

So if you really want to know what's going on in politics, theatre, music, art, movies, lectures, movements, community events, get The Voice.

You'll find out not only what's happening. You'll find out what's about to happen.



IT KEEPS YOU AHEAD OF THE TIMES.

Use this coupon for yourself

The Village Voice, c/o Department S, 80 University Place, New York, N.Y. 10003. Please send me a year's subscription (52 issues) to The Village Voice. I enclose $7.

NAME

ADDRESS CITY

STATE ZIP

$7 1 YR $12 2 YRS $16 3 YRS FOREIGN $8 1 YR

2/25

Pass this coupon on to a friend or be a nice person and give your friend a Gift Subscription

The Village Voice, c/o Department S, 80 University Place, New York, N.Y. 10003. Please send me a year's subscription (52 issues) to The Village Voice. I enclose $7.

FROM

NAME

ADDRESS CITY

STATE ZIP

$7 1 YR $12 2 YRS $16 3 YRS FOREIGN $8 1 YR

2/25

Appendix E

Letter

[LETTERHEAD OF]

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn, N. Y. 11201

November 28, 1972

The Village Voice
80 University Place
New York, N. Y. 10003

Attention: Daniel Wolf, Editor

Gentlemen:

In your issue of October 12 you published an article entitled "Judge Corso and the Mafia." The two judges mentioned are members of the bench in Kings County.

The Board of Trustees of the Brooklyn Bar Association directed me as President to appoint a Committee to investigate the charges made in your magazine. I now have the results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect. The sources from which we obtained our information were equally available to your reporter and it is regrettable that he did not take the time to investigate fully or properly.

Very truly yours,

BROOKLYN BAR ASSOCIATION

/s/ EDWARD J. CONNOLLY

Edward J. Connolly,
President

EJC:sb

Appendix F

Affidavit of James C. Goodale in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

New York County Index No. 8824/73

Docket No. 1760

DOMINIC S. RINALDI,

Plaintiff-Appellee,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

State of New York)
County of New York) ss.:

JAMES C. GOODALE, being duly sworn, deposes and says:

1. I am Executive Vice President of The New York Times Company. I am fully familiar with all the facts and circumstances relating to this motion.

2. This affidavit is submitted in support of the defendants' motion for leave to appeal the decision of the Appellate Division to the Court of Appeals.

3. The New York Times Company (the "Times") is the publisher of *The New York Times*, a daily newspaper

with a nationwide daily circulation of about 850,000 copies and a Sunday circulation of about 1,500,000 copies. The Times carries advertising by other publications intended to increase their circulation. Indeed, the advertisement by the *Village Voice,* which is the subject of this controversy, was published in The Times. The Times publishes the largest amount of advertising by other publications of any newspaper in America. Therefore, it is apparent that the Times has a direct legal and financial interest in the enunciation of a legal doctrine in this area. However, the strongest motivation for the Times submitting this affidavit is its historical role in proclaiming and defending the rights of the free press. The Times believes that this case is a threshold case under the First Amendment which will determine the future nature of media advertising in this State and, perhaps, the nation.

4. The Times itself does promotional advertising through other media by presenting part of the content of the newspaper. Any newspaper when it shows the public what is contained in one of its issues is not merely seeking to obtain or maintain circulation, the lifeblood of the medium. It is exhibiting to potential new readers what facts, values, tastes, subjects, quantity and standards are found in its publication. This is done as much out of pride, conviction and concern for the common weal as for the purpose of increasing the consumption of a "product." In some promotional advertisements, the account of part of the contents of the paper serves the same purpose as an article in a law review or in a medical journal.

5. *The Village Voice* advertisement is an example of advocacy advertising. The advertisement is critical of a

public official and advocates methods by which malfeasant public officials in similar positions can be removed from office. The advertisement speaks of the pride of the Voice in dealing with the subject matter before other publications. Just as the learned professions of law and medicine take pride in reporting to the world what they have accomplished, newspapers have the same feeling and practice. The fact that the Voice advertisement ends with a subscription coupon does not obviate the fact that most of the advertisement constitutes an expression of a viewpoint and a demand for community action. Were the language in the advertisement to appear in an editorial in the *Village Voice*, no court would have any question but that the words were protected by the First Amendment. The language does not lose its public significance because it appears in an advertisement which includes a solicitation. By analogy, the protection which the Constitution gives to freedom of religion is not lost because a preacher bids his listeners to attend his church, to contribute funds to it, or asks that religious literature be purchased. See *Jamison* v. *Texas*, 318 U.S. 413 (1943) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

It is universally agreed that the manner in which a particular judge functions, or in which the judicial system functions, is a problem of great public interest and one which demands the protection of free debate in our open society. That this debate takes place in an advertisement with a commercial solicitation rather than in an editorial makes it no less valuable and no less worthy of the constitutional umbrella.

6. Because of its content, the *Village Voice* advertisement, in a libel action and in an invasion of privacy action, is entitled to be viewed in light of the doctrines enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); and *Booth* v. *Curtis Publishing,* 15 A.D.2d 343 (1st Dep't), aff'd w/o opinion, 11 N.Y.2d 907 (1962).

7. Should the Appellate Division's finding that the Voice advertisement is without the protection of the *Sullivan* doctrine remain the law, there is another group of "promotional" material which could lose the *Sullivan* protection. As part of its home delivery subscription campaign, the Times publishes a sixteen-page replica which is delivered to homes. There is a subscription coupon in this replica. In addition, direct mailings are made to advertising agencies, manufacturers, retailers and other potential advertisers of the complete daily newspaper, sections of it, or re-prints of particular articles. Such distribution has the limited purpose of gaining subscribers and advertisers. These publications necessarily fall within the protection of the *Sullivan* and *Hill* doctrines.

8. The important issue in this case should not be decided on the ground that because an advertisement includes the purpose of enhancing sales, it therefore is automatically labeled "commercial speech" and removed from the coverage of the First Amendment. If enhancement of sales is to be the core of whether expression receives First Amendment protection, then many front pages of America's leading newspapers could be said to be without First Amendment protection. As Justice Douglas stated in his concur-

ring opinion in *Cammarano* v. *U.S.*, 358 U.S. 498 (1958), at 514:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

9. Even if the *Village Voice* advertisement is approached as a pure advertising piece, it has been pointed out that "even advertisers enjoy First Amendment rights." *Fur Information and Fashion Council, Inc.* v. *E. F. Timme & Son, Inc.*, 364 F.Supp. 16 (S.D.N.Y. 1973). In *Fur Information*, the defendants sponsored television advertisements for artificial fur coats. Part of the advertisements were critical of the fur industry's alleged lack of concern for endangered species. The Court concluded that the defendant sought to capitalize on the issues of ecology and environmentalism and held that it did not lose its First Amendment rights in so doing.

10. The meaning of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) need not be explored in this case since a clear reading of the *Village Voice* advertisement demonstrates that "it communicated information, expressed opinion, recited grievances, protested claimed abuses. . . ." *New York Times* v. *Sullivan supra*, at 266. That the advertisement also sought subscriptions is irrelevant.

11. Because of the importance of this case in the historic development of the law concerning freedom of the press, the Times urges the Appellate Division to grant leave to the defendants to appeal to the Court of Appeals.

/s/ JAMES C. GOODALE
James C. Goodale
Executive Vice President

(Sworn to April 2, 1975.)

Appendix G

Affidavit of Edward R. Cony in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 8824/73

DOMINIC S. RINALDI,

Plaintiff,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants.

State of New York)
County of New York) ss.:

Edward R. Cony, being duly sworn, deposes and says:

1. I am Vice President and Executive Editor of Dow Jones & Company, Inc. ("Dow Jones"). This affidavit is submitted in support of the Defendants' motion for leave to appeal the decision of the Appellate Division herein to the Court of Appeals.

2. Dow Jones is the publisher of, *inter alia,* The Wall Street Journal, Barron's National Financial and Business Weekly and The National Observer, all of which are distributed throughout the United States and abroad. All said Dow Jones publications carry paid advertising de-

signed to increase advertising in or circulation of other publications. Dow Jones similarily seeks to enlarge the advertising in and circulation of Dow Jones publications by placing advertisements therefor in non-Dow Jones publications.

3. In attempting to sell a product of whatever nature through advertising it is of course usual to describe the product or to display pictures of it or both so that the reader will be able to determine whether he wishes to purchase it. A publisher's product is the words and pictures that comprise its publications. When a publisher wishes to stimulate sale of its publication or advertising therefor, it will place advertising containing descriptions or examples of the product being sold. Publishers place such advertising in other publications in order that it will be seen by prospective purchasers who are not readers of the publication being advertised.

4. Thus, Dow Jones has followed the practice of placing in other publications advertisements which in whole or in part consist of material first published in Dow Jones publications. Dow Jones believes that readers of the advertisements, upon becoming aware of the contents of the Dow Jones publications, will wish to purchase them or advertising space in them. For example, Dow Jones from time to time has republished the entire front page of the Eastern Edition of The Wall Street Journal in the same day's edition of The New York Times. As further example, Dow Jones from time to time has published as advertisements in other publications editorials on matters of public interest originally appearing in Dow Jones publications

where Dow Jones believes that the editorials are of unusual quality or interest.

5. One reason Dow Jones places such advertising, as outlined above, is to stimulate advertising and circulation revenue, but another significant purpose and substantial effect of such advertising is to disseminate news, information and opinion among vast numbers of people who, as non-readers of Dow Jones publications, would otherwise not receive it.

6. When Dow Jones initially publishes news, articles and editorials it does so under the protection of the First and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. Our attorneys advise us that, according to the opinion of the Appellate Division in the instant case, such protection is entirely lost when the same material is published in advertising form.

7. As a matter of fact, the result of the apparent stripping away of constitutional protection by the Court is that Dow Jones has curtailed and may well feel impelled to continue to curtail commercial advertising, both in its publications and for its publications, where such advertising consists of reproduced or summarized news, articles or editorials. Presumably other publishers will be led to act similarly. The result will not only be to reduce revenue for Dow Jones and the other publishers and to restrict seriously this highly effective and beneficial method of advertising, but, more important, to reduce materially the

flow of information and opinion which such advertisements represent.

8. Finally, Dow Jones, like other newspaper publishers, distributes copies or portions of its publications to selected audiences for the purpose of encouraging the recipients to purchase the publications or advertising in them. It is difficult to distinguish conceptually between the legal significance of the distribution of a portion of a publication in the form of an advertisement and the distribution of the entire publication for advertising purposes. Such distribution of an entire or part of a publication might well be deemed to be "commercial advertising" within the reasoning of the Appellate Division. Therefore we fear that some or all of the contents of publications thus disseminated as advertising will be deemed to be without First Amendment protection. The result would be to eliminate or restrict sharply this common practice which is otherwise beneficial both to publishers and readers.

9. Because of what we believe will be the dramatic and deleterious effect of the decision and opinion of the Appellate Division herein, we respectfully urge that leave to appeal to the Court of Appeals be granted.

/s/ Edward R. Cony

(Sworn to April 1, 1975.)

Appendix H

Affidavit of Edward A. Miller in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

New York County Index No. 8824/73

Docket No. 1760

DOMINIC S. RINALDI,

Plaintiff-Appellee,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

State of New York)
County of New York) ss.:

EDWARD A. MILLER, being duly sworn, deposes and says:

1. I am General Counsel to Harper & Row, Publishers, Inc., and am familiar with the facts and circumstances relating to this motion.

2. This affidavit is submitted in support of the defendants' motion for permission to appeal the decision of the Appellate Division to the Court of Appeals.

3. Harper & Row, Publishers, Inc. ("Harper & Row") is the publisher of approximately 1700 books per year, including both fiction and non-fiction, the latter of which include many books about current subjects of public interest involving public figures and public officials.

4. When Harper & Row initially publishes books dealing with public officials, public figures and matters of public interest, it does so under the protection of the First and Fourteenth Amendments to the United States Constitution as defined in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) and its progeny.

5. An essential phase of the business of Harper & Row is the advertising and promotion of its books. Harper & Row occasionally takes advertisements which summarize portions of the books it has published and, in addition, engages in a wide variety of publicity efforts designed to attract public attention to the content of its books.

6. The opinion of the Appellate Division in this case apparently raises serious questions as to whether or not the protection of *New York Times* v. *Sullivan* is lost when portions of a book are republished in advertising form.

7. Harper & Row will have to reconsider the advertising and promotional efforts it employs where such advertising consists of reproduced or summarized versions of material appearing in book form. Presumably, other book publishers will be forced to undertake a similar review of their policies.

8. In view of the serious consequences of the decision of the Appellate Division in this case we respectfully urge that permission to appeal to the Court of Appeals be granted.

/s/ Edward A. Miller
Edward A. Miller

(Sworn to April 8, 1975)

SUPREME COURT, U. S.

FILED

SEP 3 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC. and
SCALI, McCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

IRWIN N. WILPON
Counsel for Respondent
50 Court Street
Brooklyn, New York 11201
(212) 875-7480

September 1975.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC. and SCALI, MCCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioner, The Village Voice, Inc. (hereinafter called Voice), a weekly newspaper, published articles about the respondent, a Justice of the New York Supreme Court, authored by Jack Newfield, one of its editors, dated August 31, 1972 (R29)*, October 12, 1972 (R32), November 9, 1972 (R37), and November 30, 1972 (R40). Jack Newfield also wrote an article in New York Magazine dated October 16, 1972 (R45) in which he repeated what he had said about respondent in the Voice.

* Numbers in parenthesis refer to page numbers of Record in Appellate Division.

The petitioner, Scali, McCabe, Sloves, Inc. (hereinafter calle Scali), is an advertising agency hired by Voice by a written contract (R69-81) under which, for a minimum compensation of $1000 a month, Scali agreed "to use its best efforts to develop successful advertising for Voice's product." Scali "reserves the right to refuse to prepare any material or cause publication of any material which in its sole judgment would be misleading, indecent, defamatory or unlawful." Voice agreed to indemnify Scali against any loss, including the cost of defending, in any suit or claim arising out of any advertisement prepared for and approved by Voice before publication.

The respondent's amended complaint against the petitioners (R20) contains two causes of action (1) for libel and (2) a statutory action under Sections 50 and 51 of the Civil Rights Law of New York. The action is based on the commercial advertisement, prepared by Scali and approved by Voice, published in the New York Times on February 25, 1973 (R27, Appendix to petition p. 14a). The advertisement refers to the prior articles written by Jack Newfield and repeats statements from them. These articles are attached to and made a part of the amended complaint (R28-48), which alleges these articles to have been false and maliciously published and that the false and malicious advertisement was published by the petitioners to gain commercial and financial advantage and to sell and obtain paid subscriptions for Voice by capitalizing on and exploiting the false articles concerning the respondent (R22).

The answers of the petitioners pleaded as a defense that the advertisement was privileged under the First Amendment (R52). The respondent moved to dismiss this defense. The petitioners moved for summary judgment. The New York Supreme Court at Special Term dismissed

the defense and denied the motion for summary judgment. The Appellate Division modified the order of the lower court to the extent of reinstating the defense. While stating that the advertisement was a commercial advertisement unprotected by the First Amendment, the Appellate Division stated that "at the very least the record presents an issue as to the character of the publication." The Appellate Division affirmed the denial of summary judgment to the petitioners, holding that even assuming that the advertisement was privileged, it would not survive a malicious publication and that the respondent had shown proof of malice which precluded summary judgment (Appendix to petition p. 3a).

Summary of Argument

1. The judgment below is not final because even if the commercial advertisement in this case was held to be entitled to the same First Amendment protection as a news article, there is evidence of malice which meets the standard set down by this Court in *New York Times* v. *Sullivan* (376 U.S. 254) and later cases and would thus deny First Amendment protection to the petitioners. The determination of the question of whether the commercial advertisement, absent a showing of malice, is entitled to First Amendment protection, would thus still leave this case without final determination which can only be had after a trial in the State Court on the issue of malice.

2. The statements in the commercial advertisement in this case are false. There is no constitutional protection for false advertisements. In *Bigelow* v. *Virginia* — U.S. —, 44 L. ed. 2d 600, this Court did not extend to commercial advertisements the same First Amendment protection

as it has accorded noncommercial publications. This Court in *Bigelow* held that in the circumstances of that case the commercial advertisement was protected without deciding the extent of the protection afforded under other circumstances (p. 614). At page 615, this Court said: "No claim is made, nor could any be supported on this record that the advertisement was deceptive or fraudulent," citing in footnote 13, 78 Harv. L. Rev. Art. 1197-1198 and 80 Harv. L. Rev. 1010-1015 as to the First Amendment protection afforded false advertising. The right of governmental and administrative agencies to restrain or suppress false advertising has uniformly been sustained by the courts and has been applied equally to advertising by the press as to other advertisers (*Donaldson* v. *Read Magazine,* 333 U.S. 178, 192, 92 L. ed. 620, 642; *United States* v. *Hunter,* 459 F. 2d 205, 211, 212 cert. den. 409 U.S. 934). If commercial advertisements had been accorded the same First Amendment protection as noncommercial publications, such sanctions would have been rendered impermissible and the only remedy for such falsity would be a suit for damages by an aggrieved party upon a showing of fault or malice in the appropriate case.

3. There is clear proof of malice in this case. The statements about the respondent in the advertisement, are, as the author, himself, stated in pre-trial disclosure, based on four cases discussed in the articles of August 31 and October 12 and 16, 1972. The Brooklyn Bar Association took cognizance of these articles and made an investigation, as a result of which the President of that Bar Association wrote a letter to Voice (R140, Appendix to petition p. 16a), admitted by Voice to have been received, in which he informed Voice that the Bar Association's investigation "disclosed that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect." Voice disregarded this letter alerting

it to the falsehoods published by it and made no attempt even to check the public court records in those cases or to make any inquiry whatsoever.

A Legal Aid lawyer, named Joseph Morello, wrote a letter to New York Magazine (R139, attached to this brief as Appendix A, p. 1a) in which he advised it of the misstatements and omissions made by the author, Jack Newfield, about the *Burton* case, in the article in New York Magazine and also in Mr. Newfield's articles in Village Voice. This letter was forwarded by New York Magazine to Jack Newfield, the author, and he admitted, on pre-trial disclosure, that he received it.

In addition, the Association of the Bar of the City of New York also investigated the charges against the respondent made by Jack Newfield in his article of October 16, 1972, which are repeated in the advertisement. As part of its investigation the Association of the Bar obtained transcripts of the minutes in the cases Jack Newfield based his charges on. The Committee of the Association of the Bar interviewed Jack Newfield as to these charges on December 28, 1972 (Appendix B, p. 4a). At that time, in its discussion with him, it pointed out to him his errors and omissions in his articles about those cases. The advertisement sued on here was in preparation from October 25, 1972 to its publication on February 25, 1973. George Dillehay, Voice's officer who handled the preparation of the advertisement, testified on pre-trial disclosure that he discussed the advertisement with Jack Newfield "during the period that it was first proposed up until it was published, at different points throughout that period of time" and showed him the proposed copy and Mr. Newfield never said to him "that it was in any respect inaccurate or untrue" (R470, 474). Thus, two months after Voice had actual knowledge of the contents of the Court minutes

in the cases relied on by its author-editor in his articles and thus then knew that its statements about the respondent's conduct of those cases were untrue, it repeated those false and erroneous statements in the advertisement. This is conclusive evidence of malice in the publication of the advertisement.

ARGUMENT

I.

The judgment below is not final.

The Appellate Division held that even assuming the advertisement was privileged, the privilege would not survive a malicious publication and that there is sufficient evidence in the record to support a finding of malice (47 A.D. 2d at p. 182, appendix to petition p. 3a).

As shown, hereinafter, under our point III as to malice, there is substantial proof of malice in addition to that referred to by the Appellate Division.

Thus, regardless of the disposition of the question of the extent of First Amendment protection, absent a showing of malice, to be accorded this commercial advertisement, this case would still have to be tried in the State Court on the proof of malice shown by the respondent.

The determination of the commercial advertisement question would thus not be conclusive and render the outcome of further proceedings preordained as is required to meet the jurisdictional requirement of finality (*Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L. ed. 2d at p. 340).

II.

There is no constitutional protection for false advertisements.

A.

The statement that the respondent is "Curiously lenient with heroin dealers and organized crime figures, very tough on long haired attorneys, black defendants on questions like bail, probation and sentencing" is taken from Jack Newfield's article in New York Magazine dated October 16, 1972 (R45). The statement that respondent should be criminally indicted and tried or impeached is taken from the Voice article dated October 12, 1972 (R36).

In his articles about the respondent, the author Jack Newfield wrote about four cases which had come before Justice Rinaldi, *People* v. *Burton, People* v. *Glover, People* v. *Vario* and *People* v. *Agro.* With respect to his statement that Justice Rinaldi is "curiously lenient with heroin dealers and organized crime figures" Mr. Newfield testified on pre-trial disclosure, "That statement was based on my previous writing about the Burton, Glover, Vario and Agro cases primarily" (R402) and that when he wrote that the respondent is "very tough on long haired attorneys and black defendants," he had "no specific cases in mind." (R401).

It was false to charge the respondent with such judicial bias and prejudice in his dispositions in those four cases.

In *Burton* as the Court minutes on file (R424) show, Burton was paroled without bail because the assistant district attorney stated on the record that "in view of the fact that he is on bail on two other charges and this bribery charge emanates from those two others, we will have him available. I would recommend parole." (R430).

In *Glover,* as the Court minutes on file show (R414), Glover had just received a five year Federal sentence on a conviction for robbery. Justice Rinaldi postponed Glover's case until the time to appeal from the Federal conviction had expired. Then, with the acquiescence of the district attorney, to dispose of the case, he accepted a plea from Glover with no imposition of any additional time in jail, since Glover would be in jail for the next five years. Glover was then taken off in the custody of Federal marshals to serve that five year sentence. Thus, the respondent did not, as Mr. Newfield's article stated "put people (Glover) on the street who sell death for a profit." (R30).

In *Vario,* the Court minutes (R435) show that the case came on before Justice Rinaldi four years after a conviction after a prior three month trial had been reversed because of illegal wiretaps which were suppressed by the Appellate Division. The district attorney stated to Justice Rinaldi on the record that, because of the suppressed evidence and the fact that the case was four years old, he had grave doubt that he could get a conviction and for this reason he recommended the acceptance of a misdemeanor plea from the defendants. Thus, the statement in Mr. Newfield's article that Judge Rinaldi permitted the defendants to plead guilty to a misdemeanor plea and upon such plea let them go with only a $500 fine despite the fact that the district attorney thought they should have gotten at least ten years in jail (R45), is monstrously false since the district attorney, proposing the misdemeanor plea, could never have expressed such a thought, the maximum sentence for a misdemeanor being one year.

In *Agro,* the Court minutes on file show that there was a large number of defendants, who, except for Agro, wished to plead guilty. Agro insisted he was innocent and would

not plead. The district attorney did not wish to try the case only as to Agro. He stated on the record that Agro was the least culpable and had no record and that if Agro would plead to a misdemeanor, he, the district attorney, would recommend a suspended sentence (R217-218). Agro agreed to take the plea if the Judge would promise him the suspended sentence. On the district attorney's recommendation, the respondent made the promise and later, on sentence date, kept it, as he was then required to do under *Santobello* v. *New York,* 404 U.S. 257, 262, 30 L. ed. 2d 427.

To say, as petitioners do, that they claim that the publication complained of is true (petition p. 2, footnote 2) is like saying of a married woman that she was naked in a room with a man not her husband, omitting to say the man was a doctor giving her a physical examination, and then claiming that, since she was so in the room, the statement, with all that it implies, is true.

Needless to say, the petitioners offered no proof on their motion for summary judgment of the truth of these statements, nor of the other statements in the advertisement about the "judge's activities against society" and that "Judge Rinaldi has a whole record of curious behavior" and that Judge Rinaldi is a "questionable judge" who should be eliminated by "criminal indictment and trial, impeachment by the State Legislature or trial on competency by a judicial court" (R27, appendix to petition, p. 15a).

Such statements are false and libelous (*Afro American Pub. Co.* v. *Jaffe,* (D.C. Cir.) 366 F. 2d 649, 655; *Abell* v. *Cornwall Industrial Corp.,* 241 N.Y. 327, 332, 150 N.E. 132).

The untruth of the charges is evidenced by the conclusions, after investigation, by the Brooklyn Bar Association

that "the facts reported by the author are inaccurate, incomplete and in many cases are totally inaccurate" (R140, appendix to petition p. 16a) and by the Association of the Bar of the City of New York that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix B annexed to this brief, p. 7a).

B.

Since the statements in the advertisement concerning the respondents are thus clearly false it cannot be said that "no claim is made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent" (*Bigelow* v. *Virginia supra* 44 L. ed 2d 600, 615).

False advertising has always been denied First Amendment protection (*Donaldson* v. *Read Magazine,* 333 U.S. 178, 192, 92 L. ed 2d 628, 642; *E. F. Drew & Co.* v. *F. T. C.* (2 Cir) 235 F. 2d 735, 740, cert. den. 352 U.S. 969; *F. T. C.* v. *Sterling Drug Co.* (D.C.N.Y.) 215 F. Supp. 327, 332, affd. 317 F. 2d 669; *United States* v. *Hunter* (4 Cir) 459 F. 2d 205, 211, 212, cert. den. 409 U.S. 934; *Murray Space Shoe Corp.* v. *F. T. C.* (2 Cir) 304 F. 2d 270, 272.

It is inherently indecent and obscene to permit a newspaper to take advantage of the license afforded it by *Times* v. *Sullivan* to make false statements about a public official and then seek to capitalize on the falsity by an advertisement repeating and bragging about the falsehoods to obtain paid subscriptions to its paper (See 80 Harv. L. Rev. 1031).

A newspaper has no greater right to advertise its product than does any other product advertiser (*Curtis Publishing Co.* v. *Butts* 388 U.S. 130, 150, 18 L. ed 2d 1094;

United States v. *Hunter, supra,* 459 F. 2d 205, 211, 213, 214, cert. den. 409 U.S. 934; *Associated Press* v. *Labor Board,* 301 U.S. 103, 132-133, 81 L. Ed 953, 969; *Branzburg* v. *Hayes* 408 U.S. 665, 682-683, 33 L. ed 2d 626, 640).

The director of agency services for petitioner Scali, Leonard Hultgren, testified on pre-trial disclosure that Voice was just another advertising client, sales of whose product was sought to be enhanced, and was no different to the agency than advertisers of products such as beer, cigarettes or automobiles (R491-492).

In the case of *Booth* v. *Curtis Publishing Co.* 15 A. D. 2d 343, 223 N.Y.S. 2d 737 affd. 11 N.Y. 2d 907, 182 N.E. 2d 812, cited at page 10 of the petition, there was nothing false in the advertisement. The Court there stated (15 A.D. 2d at pp. 351, 352) that the advertisment was a "true and fair presentation" in which the plaintiff "was properly and fairly presented."

It is the setting given the commercial advertisement which places it beyond First Amendment protection (*Breard* v. *Alexandria,* 341 U.S. 622, 642, 95 L. Ed. 1233, 1248).

Such a commercial setting has denied First Amendment protection in obscenity cases (*Ginzburg* v. *United States,* 383 U.S. 463, 465, also footnote 17 p. 474, 16 L. ed 2d 31, 40; *Paris Adult Theatre I* v. *Slayton* 413 U.S. 49, 69, 37 L. ed 2d 446; *Miller* v. *California* 413 U.S. 15, 34, 36, 37 L. ed 2d 419; *Kaplan* v. *California,* 413 U.S. 115, 120, 37 L. ed 2d 492) and to users of the flag for commercial purposes (*Halter* v. *Nebraska* 205 U.S. 34, 51 L. Ed. 696; *Smith* v. *Goguen,* 415 U.S. 566, 39 L. ed. 2d 605, *Spence* v. *Washington,* 418 U.S. 405, 41 L. ed. 2d 842).

III.

There is ample proof of malice in this case.

In his article dated August 31, 1972 (R29), Jack Newfield wrote in Voice about the *Burton* and *Glover* cases. In the article dated October 12, 1972 (R33) he repeated what he had said about *Burton* and *Glover* : "Six weeks ago I wrote a Voice article describing two cases involving heroin dealers where Judge Rinaldi let them both go without a jail sentence (Justice Gets A Fix, Voice August 31)" and he then discusses the alleged facts about both cases. The October 12, 1972 article then discusses the *Vario* and *Agro* cases. In his New York Magazine article dated October 16, 1972 Newfield repeats his statements about the *Burton, Glover* and *Vario cases* (R45).

The Brooklyn Bar Association, its attention having been called to these articles, conducted an investigation of the charges made therein. By letter dated November 28, 1972 (R140, appendix to petition p. 16a) the President of the Brooklyn Bar Association advised Voice of the "results of the investigation which discloses that the facts reported bythe author are inaccurate, incomplete and in many cases are totally incorrect." A similar letter was written by the President of the Bar Association to New York Magazine (R329). The receipt of the Brooklyn Bar Association letter is admitted by Voice. George Dillehay, the officer of Voice, who handled the preparation of the advertisement, also admitted on pre-trial disclosure that he had read the letter (R.468).

Although in receipt of such a letter from so responsible a source, Voice disregarded it. It did nothing, although the official stenographic minutes in all these cases were sitting in the files, as a public record, available to anyone

to examine. Voice did not even reply to the Brooklyn Bar Association requesting any further details.

Petitioners brazenly assert (petition, p. 13) that they were completely justified in ignoring the advice in the letter, that the articles were erroneous, because the letter did not specifically point out the errors and that Voice had no obligation to request this information, that it was the obligation of the Bar Association to supply it and not having done so, Voice could ignore the Bar Association's alert to Voice's misstatements.

For the purposes of satisfying the requirements of showing malice, it is patently sufficient that the publisher's attention was called to the fact that its publication was incorrect by a responsible and reliable informant, which the Bar Association certainly was. To totally disregard such a communication and to republish the false statements in the advertisement is, at the very least, to circulate it "with reckless disregard for its truth or falsity" (*Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. 469, 43 L. ed 2d at p. 346).

The statement at page 13 of the petition that the advertisement sued on was based on the Voice article of August 31, 1972 and not on the October 12 and 16, 1972 articles is likewise untrue. The heading in the advertisement: "the judge let the pusher go free" is taken from the article of October 12, 1972 (R33). The statement that the respondent is "curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants on questions like bail, probation and sentencing" is taken from the New York Magazine article of October 16, 1972 (R45). The statement that the respondent should be eliminated by criminal indictment and trial or impeachment or judicial trial on incompetency

is taken from the Voice article of October 12, 1972 (R36). This is apparent from a reading of the articles since they are virtually verbatim statements therefrom. Jack Newfield, on pre-trial disclosure, admitted this (R302-303, 374-376). Karen Gray, the copy writer for Scali, who prepared the advertisement, testified on pre-trial disclosure (pp. 15-17) that these statements in the advertisement were taken by her from these October 12 and 16 articles.

On October 12, 1972, a Legal Aid lawyer, named Joseph Morello, wrote a letter to New York Magazine advising it that the statements in its article with respect to the *Burton* case, more elaborately stated in Jack Newfield's prior Voice article, were erroneous. Mr. Morello specifically informed in his letter that Justice Rinaldi released Burton without bail "*only* upon the consent and recommendation of the District Attorney" (R139, Appendix A annexed to this brief, p. 1a). ***Mr. Newfield admitted that New York Magazine forwarded Mr. Morello's letter to him and that he received it*** (R319). He thus had specific knowledge, from the letter, that in *Burton* the district attorney had recommended the parole. If Voice chose to disregard this knowledge conveyed to its author, who was also one of its editors, and to republish the falsity, despite such knowledge, this constitutes malice (*St. Amant* v. *Thompson* 390 U.S. 727, 731 20 L. ed 2d 262, 267).

The letters received from the Brooklyn Bar Association and Mr. Morello show knowledge by Voice sufficient to constitute malice in the publication of the falsehoods in the advertisement (*Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. 130, 161 (footnote 23), 18 L. ed 2d 1094, 1115; *Davis* v. *Schuchat* (D.C. Cir. 1975) 510 F. 2d 731, 735; *Church of Scientology of Cal.* v. *Dell Publishing Co.* (D.C. Cal.) 362 F. Supp. 767, 770; *Varnish* v. *Best Medium Publishing Co.* (2 Cir.) 405 F. 2d 608, cert. den. 394 U.S. 987;

Goldwater v. *Ginzburg* (2 Cir.) 414 F. 2d 324, 337, cert. den. 396 U.S. 1049; *Guam Federation of Teachers* v. *Israel* (9 Cir.) 492 F. 2d 438, 439).

In addition, the respondent now has evidence from the Report of the Association of the Bar which conclusively establishes that two months before the publication by the petitioners of the advertisement in the New York Times on February 25, 1973, Jack Newfield was apprised of and knew the contents of the official court transcripts of the minutes in the *Burton, Glover* and *Vario* (referred to in the Report as Marinaci) cases. The respondent knew that the Association of the Bar was making an investigation and had obtained copies of these minutes. Though the Report is dated June 8, 1973, it is a confidential report and was not made public until April 9, 1974. Some time thereafter, the respondent obtained a copy of the Report and, for the first time, learned that the Bar Association Committee had interviewed Jack Newfield on December 28, 1972 with respect to his charges against respondent. Thus, when the petitioners moved for summary judgment on December 6, 1973 (R83), respondent was unaware of this and, of course, it is not a part of the opposing affidavit on the motion.

The Association of the Bar was investigating Jack Newfield's article dated October 16, 1972 in New York Magazine entitled "The Ten Worst Judges in New York" (R43). Its Report, deleting the references to judges other than respondent, is annexed to this brief, as Appendix B, p.). In the article, Jack Newfield made the statement about respondent, which is repeated in the advertisement sued on herein (R27 appendix to petition, p. 14a) that "Rinaldi is very tough on long-haired attorneys and black defendants on questions like bail, probation and sentencing. But his judicial temper softens remarkably before heroin dealers and organized crime figures." He then, in that

article, discusses the *Burton, Glover* and *Vario* cases as the basis for these statements. On pre-trial disclosure, he testified that these statements of his were based "on the *Burton, Glover, Vario* and *Agro* cases primarily" (R402).

From the Bar Association Report, and its discussion of the contents of the minutes in the three cases, *Burton, Glover* and *Vario*, it is clear that the Committee called the attention of Mr. Newfield in the interview, to the contents of these minutes and questioned him about his omissions of vital facts in these cases in his article. Thus, at that time, Jack Newfield knew what had actually occurred in court in those three cases and that he had omitted essential facts from his article which thus falsely distorted the respondent's actions in those cases.

The advertisement, upon which this suit is based, was in preparation through a series of revisions from October 25, 1972 to its insertion in the New York Times on February 25, 1973 (R533-547). George Dillehay was the officer of Voice who handled the preparation of the advertisement. He testified on pre-trial disclosure that he discussed this advertisement, before it was published, with Jack Newfield "during the period that it was first proposed up until it was published, at different points throughout that period of time" (R470) and that he showed Mr. Newfield the proposed copy and that Mr. Newfield "had seen what was going to be said in the ad and what was finally said, in substance" and that Mr. Newfield had never said to him "that it was in any respect inaccurate or untrue" (R474).

Jack Newfield testified on pre-trial disclosure that if he knew, when he wrote the article about *Burton*, that the district attorney had recommended and consented to Burton's release without bail, he would have put that in the story in "plain fairness" and that "if I knew it and withheld that

information, it would have been unfair" (R326-327). Yet, during his discussions of the proposed advertisement with Mr. Dillehay, when he did know, he did not tell Mr. Dillehay that it was erroneous or unfair. Of course, a fair and accurate statement of the facts in the *Burton*, as well as the *Glover*, *Vario* and *Agro* cases would have made the advertisement useless from the petitioners' muckraking standpoint and a fair and accurate advertising copy would have been discarded and never published. Only the false advertisement was suitable to the petitioners' purposes.

This, previously unknown to respondent, evidence will, of course, be used by respondent on the trial and constitutes overwhelming proof of malice.

Mr. Newfield testified on pre-trial disclosure that what he wrote about the fourth case he relied on, *Agro*, in his article dated October 12, 1972 (R33) he had taken from an article in the New York Times of September 25, 1972 (R47) which is referred to in the advertisement (R27 appendix to petition, p. 15a). Mr. Newfield admitted that the Times article contained the following statements which he had read before he wrote his article dated October 12, 1972 (R331-332):

> "The assistant district attorney in charge of the case apparently concurred with the judge's decision. He later signed a report saying that the pleas in each instance are recommended and the sentence in each case would be adequate.
>
> He said in the report that Agro was the least culpable of the defendants. Salvatore Agro was thirty-eight years old and had no prior record, Mr. Panzarella said."

Yet, although Mr. Newfield had previously testified that if he knew, when he wrote about the *Burton* bail arraign-

ment that the district attorney had recommended parole and had not written it, it would have been unfair, he admitted that though he knew of the district attorney's recommendation in *Agro*, he did not mention it in his article. When asked if he thought this likewise was unfair, he testified (R333):

> A. I think it was fair. I am summarizing that case in two paragraphs.
>
> Q. You mean The Village Voice limited you in space? A. No.

In the same New York Times article (R46) it is stated as to *Vario* that on Vario's misdemeanor plea he could have been given up to a year. Mr. Newfield admitted having read this before he wrote on October 12, 1972 that Vario could have gotten 15 years in jail (R33) and on October 16, 1972 that the District Attorney thought that he should have gotten at least ten years in jail (R45). These statements were thus known by him to be false when written and therefore written with malice.

The headline of the August 31, 1972 article (R29) reads:

BROOKLYN'S JUDGE RINALDI
JUSTICE GETS A FIX

There is nothing in the article which claims, as the headline clearly connotes, that the respondent was bribed or improperly influenced to parole Burton without bail, or in his sentence of Glover. On pre-trial disclosure, Jack Newfield testified: "In none of these articles do I allege corruption or venality" (R377). "I have no evidence of corruption" (R378). Yet, the headline clearly expresses the existence of venality or corruption, knowing that nothing in the article supports it. This is clearly malice.

The large caricature likeness in the advertisement of the respondent in judicial robes in association with the pusher, Burton, placed therein by Scali and approved by Voice, is, in itself, defamatory and malicious. Scali and its copy writer, Karen Gray, who prepared the advertisement, admitted, in the course of pre-trial disclosure, that the caricature was intended to be and was a likeness of the respondent and was intended to and did represent the pusher, Burton.

Karen Gray, a copy writer, testified in pre-trial disclosure, that the caricature was included in the advertisement right from the original draft (p. 8); that the heading which she put on the original draft was (R533):

THE PUSHER WENT FREE
THE JUDGE MAY GO TO JAIL

Karen Gray then testified as follows (p. 9):

> Q. What was the purpose of including this caricature? A. As I recall, to illustrate the headline.
> Mr. Finell: The headline of the advertisement.
> A. The judge and the pusher are mentioned in the headline. It is supposed to illustrate.

In the next two revisions of the draft of the advertisement (R535-537) the heading was changed to "The judge could go to jail" and was thereafter changed to its final form (R27, appendix to petition, p. 15a). The malicious caricature inserted in the first draft to illustrate the original headline remained however. The insertion of the caricature in the advertisement prepared by Scali and approved by Voice knowing that it falsely represented a criminal association of the judge with the pusher, constitutes malice on the part of the petitioners.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

IRWIN N. WILPON
Counsel for Respondent

September 1975.

APPENDIX A

October 12, 1972

The Editor
NEW YORK MAGAZINE
207 E. 32nd Street
New York, N.Y. 10016

Sir:

In reference to Newfield's article on the 10 worst judges.

I want to comment on his charges against Judge Rinaldi. Newfield accuses Rinaldi of letting a heroin seller go without bail.

Your author had elaborated these charges in a Village Voice article this past summer.

A brief glance at the court records will indicate:

1. Rinaldi did not arraign this defendant on the drug charge; he was arraigned before another Judge and bail was set.

2. Rinaldi did release the defendant without bail on a bribery charge (arising out of the drug bust), however, he did so *only* upon the consent and recommendation of the District Attorney.

(I practice in the Brooklyn Supreme Court with Legal Aid, have appeared before Justice Rinaldi. My hair was fairly long and I never experienced any extra flack.)

If Newfield's research on other points and judges is as faulty as this, you really have done a disservice in publishing his story without verification. The judges are not permitted to respond and set the record straight and a decent respect for your readership requires special care and attention.

Very truly yours,

JOSEPH VINCENT MORELLO
Associate Attorney

JVM:zk

CONFIDENTIAL

APPENDIX B

June 8, 1973

Orville H. Schell, Jr., Esq.
President—The Association of the
Bar of the City of New York
42 West 44th Street
New York, New York 10036

Re: Newfield Article—
"The Ten Worst Judges in New York"

Dear Mr. Schell:

In early December 1972 you requested the Association's Committee on State Courts of Superior Jurisdiction to investigate the charges made by Jack Newfield against the judges within that Committee's jurisdiction in an article entitled "The Ten Worst Judges in New York", which appeared in the issue of New York Magazine dated October 16, 1972 (pages 32-36). A copy of the article is annexed hereto.

You indicated that your request stemmed both from the commitment of the Association to defend judges against unjust criticism and from the duty of the Association to investigate charges against sitting judges. As we have also discussed, the investigation is highly relevant to the adequacy of existing procedures for the discipline and removal of judges, an area of great interest to this and other bar associations. You imposed no conditions or restrictions on your request and made no recommendations with regard to the form our conclusions might take. You simply asked us to investigate the charges and to report to you what we found, together with any recommendations we might wish to make.

Appendix B

With the above in mind, and without any preconceived notions as to what our conclusions or recommendations might be, our Committee promptly commenced its investigation by forming eight subcommittees, each composed of three members, and assigning to each subcommittee one of the eight Supreme Court judges specifically listed and criticized by Mr. Newfield as being among his "Ten Worst". Those judges were Gerald Culkin, Wilfred Waltemade, Dominic Rinaldi, Albert Bosch, George Postel, Edward Dudley, Paul Fino, and John Monteleone. Justices Culkin, Waltemade, Postel, Dudley and Monteleone were approved by this Association. Justice Fino was rated "not approved", but based solely on his refusal to appear for an interview. There is nothing in the Association's files on Justices Rinaldi and Bosch.

While the method of investigation necessarily varied for the different judges depending on the nature of the charges, interviews of practitioners and court personnel were carried out extensively, as well as review of transcripts of trials or of opinions where appropriate. Charges or intimations of bias or corruption in particular required extensive review of transcripts and opinions. Where specific trials or proceedings were referred to, the subcommittees often attempted to interview the attorneys on both sides. In most cases such interviews were carried out successfully.

The Committee also decided at the outset of its investigation that it was not only appropriate but advisable from the point of view of fairness to interview the eight judges being investigated as well as Mr. Newfield himself. Seven of the eight judges were interviewed; the single exception was Justice Fino, whose secretary kept finding it impossible to arrange for an interview and ultimately referred the

subcommittee to his attorney, who delayed fixing any date for an interview and ultimately simply defaulted. In addition, six or seven members of our Committee met with Mr. Newfield and his attorney, Martin Garbus, for almost two hours at the Association on December 28, 1972.

We have also conferred with the District Attorneys for New York and Kings Counties and with the Governor's Special Prosecutor, Maurice Nadjari. In addition, we had a check made of the files of the Association's Grievance Committee and Judiciary Committee and reviewed various recent investigative reports and articles which have appeared in The New York Times.

This description of the various sources of information resorted to by our subcommittees is not complete. The full reports of the various subcommittees, copies of which we are furnishing to you under a separate cover, indicate the additional sources relied on.

Having outlined generally the approach of the Committee and the sources to which it turned, it must be added that the Committee does not have subpoena or similar powers or an investigating staff, and to that extent the Committee is severely restricted in any investigation of this nature. No pretense can be made that these investigations are exhaustive or of the type that could be carried out by appropriate investigative authorities. Moreover, the Committee generally limited itself to the criticisms and charges in the Newfield article and to areas clearly related to the article—it did not attempt a full investigation of each judge listed by Mr. Newfield.

There follow the conclusions of each subcommittee with regard to the charges made by Mr. Newfield against the eight judges under our jurisdiction. The conclusions have been prepared in a manner deemed fit for publication by the

Association, which simply means that every effort has been made to be fair and to avoid reliance on rumor or hearsay. While this constitutes a report of the whole Committee, it should be stressed that only the members of each subcommittee are familiar with that subcommittee's full investigation and therefore non-members of a particular subcommittee have relied on the ability and integrity of the membership of each subcommittee. After presenting these conclusions, we will indicate our recommendations as to what may appropriately be done by the Association on the basis of this investigation.

Justice Rinaldi

Mr. Newfield alleges that Justice Rinaldi is very tough on long-haired attorneys and black defendants on questions of bail, probation, and sentencing. Since he gives no examples to substantiate the charges, the subcommittee did not evaluate them.

Mr. Newfield's other charge, to which he devotes the balance of the section on Justice Rinaldi, is that his "judicial temper softens remarkably before heroin dealers and organized-crime figures". As to this charge he gives three cases as examples.

Mr. Newfield criticizes Justice Rinaldi for having released Norman Burton, an alleged heroin dealer, without bail after he had been arrested on charges of possession of heroin and attempting to bribe a policeman. Mr. Newfield ignores the facts that Burton was already out on $3,000 bail on another charge, that no bench warrant was ever issued against him, and that the Assistant District Attorney had assented to Burton's being paroled without bail.

Appendix B

Mr. Newfield also criticizes Justice Rinaldi on the ground that he gave a "conditional discharge" to another drug dealer, Clifton Glover, notwithstanding that Glover had two prior arrests for selling heroin and, according to Mr. Newfield, could have been given twenty-five years in jail. Mr. Newfield omits to mention that five months earlier Glover had pleaded guilty to an unrelated robbery charge in the federal court and had been sentenced to five years imprisonment, from which no appeal had been taken. The "conditional discharge" given by Justice Rinaldi came after plea bargaining and Justice Rinaldi recognized that Glover had also received the federal court sentence of imprisonment. The transcript shows that the Assistant District Attorney remained mute when the sentence was imposed.

In fact, Glover was not entitled to a conditional discharge under the Penal Law for a Class C felony. Justice Rinaldi told the subcommittee that he gave the conditional discharge, knowing that it was not legally correct, because the Assistant District Attorney told the Court that the defendant was an informer and that the defendant and the Assistant District Attorney had agreed on the conditional discharge sentence. As to this, the Assistant District Attorney apparently had no recollection. On the other hand, the most Glover could have been given was fifteen years, not the twenty-five suggested by Mr. Newfield. While an illegal sentence cannot be approved, the subcommittee found no justification for the motivation imputed to Justice Rinaldi by Mr. Newfield.

With regard to the case involving Marinacci and others, Mr. Newfield charges that Justice Rinaldi imposed only $500 fines after the defendants, "prominent organized-crime figures", pleaded guilty to misdemeanors, adding

that the District Attorney thought that three of them should have received at least ten years in jail.

Mr. Newfield fails to mention that an earlier conviction of three of the defendants had been reversed on appeal because wiretap evidence was held inadmissible and prejudicial. Thereafter, the two Assistant District Attorneys involved had disagreed as to the chances of a successful second prosecution. The defendants then appeared before Justice Rinaldi, and the Assistant District Attorney expressed doubts in open court about a successful conviction because of evidence problems and because the case was four years old. It was therefore agreed that the defendants would plead guilty to a misdemeanor and the Assistant District Attorney in court recommended the acceptance of the plea. Justice Rinaldi sentenced one of the defendants to time already served (more than twelve months), two others to a $500 fine or six months in jail, and the fourth to a $250 fine or three months in jail.

Clearly, the District Attorney's Office felt that the sentences were not severe enough, with the possible exception of the defendant who had already served twelve months, but there is no basis for the claim that the defendants should have been given at least ten years. Not only is it denied by one of the Assistant District Attorneys, but also the maximum jail sentence was one year for the misdemeanor for which the pleas were accepted. The probation report as to two of the defendants recommended a fixed jail sentence. As to another defendant, Justice Rinaldi imposed sentence without benefit of a probation report on the ground that he had pleaded guilty to a misdemeanor.

Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC., and
SCALI, McCABE, SLOVES, INC.,
Petitioners,

v.

DOMINIC S. RINALDI,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Statement

The petition showed that the decision below conflicts with the holding of *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975), and either misperceives or misapplies the knowing or reckless falsity test. At a minimum, therefore, the petition should be granted and the case remanded to the court below for reconsideration in light of *Bigelow*.

Respondent's brief in opposition is in large part a collection of irrelevant, unsupported, and erroneous assertions, based on material outside the record below, most of which need not concern us here. In view of respondent's charges, however—particularly the charge that the petition erred in stating that the advertisement in suit was based on the August 31 article in *The Village Voice*—an elaboration of the subject matter of that advertisement is appropriate.

On August 31, 1972, *The Village Voice* published an expose of judicial leniency toward heroin dealers. That article, based in part upon original investigation by Jack Newfield and in part upon material Newfield obtained from files of the New York Joint Legislative Committee on Crime, prominently described the arraignment, before respondent Justice Rinaldi, of Norman Burton, who had been charged with attempting to bribe a police officer after arrests for heroin sales. In discussing Burton's arraignment before respondent on the attempted bribery charge, the article noted that respondent released Burton without bail and described in detail the respondent's harsh rebuke to the arresting officer in open court.[1]

1. The article (Appendix A, *infra*, p. 1a) also discussed the sentence respondent imposed in *People* v. *Glover*, a case which was the subject of the legislative committee hearings, and in which defendant received a conditional discharge upon his plea of guilty to a "Class C" felony (a sentence which respondent acknowledged, during discovery proceedings below, was "illegal"). Parenthetically, on June 16, 1972, the day after the hearings, the *New York Daily News*, in an article entitled "State Probers Put Spotlight on 4 Justices," cited respondent as one of the judges who "handed down wrist-slap sentences in felony narcotics cases" and, on the following day, that newspaper published an editorial calling for the convening of the Court on the Judiciary—the court with power to remove judges—to review the four cases of "alleged judicial misconduct" (R. 91-92).

On February 25, 1973, the advertisement which is the subject matter of this suit was published (Petition, Appendix D, p. 14a). By its terms, the advertisement is based upon the August 31 article.[2] Most of the portion of that advertisement relevant to respondent is nothing more than a summary of the *Burton* arraignment as described in the August 31 article. Indeed, except for explicit references in the advertisement to later articles in the *New York Times* and *New York Magazine*, the *only* factual statements in the advertisement concerning respondent are statements about the *Burton* arraignment taken from the August 31 article, including the "strange" behavior of respondent, who released without bail a heroin dealer (Burton) with a long record of arrests and convictions, and then, curiously, "yelled at and humiliated" the arresting officer. The remainder of the advertisement, insofar as it concerns respondent at all, either expressly refers to (i) subsequent reports of *The New York Times* or *New York Magazine*, (ii) opinions and conclusions concerning respondent's behavior ("curiously lenient," "very tough") which manifestly may be drawn from the *New York Times* study (whose accuracy is not in issue here) and (iii) accurate descriptions of the methods by which the citizenry might remove "questionable" judges.

Accordingly, the petition stated that the advertisement in suit was based upon the August 31 article; and,

---

2. "We broke Jack Newfield's story in August, several weeks before any other publication." (Petition, Appendix D, p. 14a)

notwithstanding respondent's assertion to the contrary (Respondent's Brief, p. 13), that is the fact.[3]

Thus, insofar as respondent in this case intends to challenge the factual statements in the advertisement—as opposed to mere opinions and conclusions, which are absolutely beyond the ken of the law of defamation as it relates to public officials[4]—respondent's challenge must be to the statements concerning the *Burton* arraignment contained in the advertisement. And insofar as respondent claims that the allegedly defamatory material was published with knowing or reckless disregard of its falsity, his claim must relate to those same factual assertions.

---

3. The headline ("The judge bawled out the cop. And let the pusher go free.") plainly refers to the *Burton* arraignment described in the text, and not some other article as respondent asserts (Respondent's Brief, p. 13). Furthermore, respondent's statement (Brief, p. 12) that the story of the *Burton* arraignment was repeated in an October 12 article in the *Voice* (and thus that the advertisement is based upon the October 12 article) is not correct: the October 12 article (Appendix B, *infra*, p. 5a) simply made a passing reference to the fact that an article concerning Burton had appeared in the August 31 edition of the *Voice*. Finally, respondent's statements that the opinions or characterizations quoted in the text—"curiously lenient" and "tough"—are taken from the October 12 *Voice* article and a *New York Magazine* article ignores the fact that those opinions and characterizations are just that, opinions and characterizations. An examination of the *New York Times* article (Appendix C, *infra*, p. 13a) shows that those characterizations are perfectly proper conclusions based upon the facts set forth in the indisputably accurate *Times* article and the undisputed facts concerning the *Burton* arraignment.

4. As this Court recently stated: "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

ARGUMENT

I

The judgment below meets the applicable tests of finality.

For the reasons set out at pages 2-5 of the petition, this case meets the tests of finality in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), and the other cases cited.

Respondent's argument that there is no finality is erroneous for two reasons: First, if we are correct in our argument that there has not been a constitutionally adequate showing of malice, then petitioners would be entitled to summary judgment and, contrary to respondent's argument, no further proceedings in the state court should ensue. Second, the portion of the decision below holding that advertisements are wholly outside the scope of the First Amendment is squarely contrary to *Bigelow* v. *Virginia,* 44 L.Ed.2d 600 (1975). Such a decision, if now allowed to stand unmodified, would necessarily, but improperly, protract any subsequent proceedings in this case, and would chill criticism of public officials by other New York newspapers.

II

This is not a "false advertising" case.

Respondent argues that because he claims the advertisement falsely defames him, the advertisement is entirely without First Amendment protection. "False advertising," he asserts, is beyond the scope of the First Amendment.

This is not, however, a false advertising case; and thus the authorities relied upon by respondent are inapposite. It is not contended, for example, that the advertisement falsely informs readers of the price of the newspaper advertised. Nor is it contended that the solicitation of subscriptions is fraudulent in that the subscriber would not receive the issues of the newspaper provided in the subscription form. And, most importantly, it is undisputed that the advertisement in suit *accurately* portrays material previously published in the newspaper being advertised, *The Village Voice.*

The present controversy, therefore, does not concern false advertising; it concerns, rather, the constitutional standards to be applied in defamation actions brought by public officials in response to press criticism. Specifically, the action raises the questions whether, and if so to what extent, those standards change when the press advertises its criticism of the official.

We submit that under the principles of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and *Bigelow* v. *Virginia,* 44 L.Ed.2d 600 (1975), a public official who claims to

have been defamed by a press advertisement criticizing his conduct in office must meet the *Times* standard of knowing or reckless falsity.

Therefore, the court below erred, first of all, in its holding that the advertisement in suit is not entitled to *any* First Amendment protection.

III

There has been no constitutionally adequate showing of knowing or reckless falsity.

The second major error committed by the court below was its application of a constitutionally inadequate standard of knowing or reckless falsity in denying summary judgment to petitioners.

This action, it is worth repeating, is based solely upon the advertisement in suit and not upon the array of other articles and statements—in the *Voice* and in other publications—about which respondent indiscriminately complains in his brief in opposition. The numerous statements in various articles which respondent quotes and attacks in his brief do not appear in the advertisement in suit and are therefore not pertinent here.

As set forth at pages 11-14 of the petition, to prevail—or even to put petitioners to the burden of a trial—respondent must show evidence that the statements *in the advertisement* were knowingly or recklessly false. He has not done so:

(1) Respondent relies—and the court below apparently relied *exclusively*[5]—upon an October 16, 1972 letter from Edward J. Connolly to the *Voice*. But the Connolly letter is no evidence whatsoever that the statements in the *advertisement* were published with knowing or reckless falsity. The Connolly letter, by its terms, challenges only the factual assertions in an October 12 *Voice* article—an article that dealt not with respondent's handling of the *Burton* case, which the advertisement in suit described, but of two other cases (*People* v. *Vario* and *People* v. *Agro*) which the advertisement did not describe.[6]

Therefore, the Connolly letter could not have put the *Voice* on notice that the factual statements in the *advertisement* were false. If, as respondent asserts (and the court below apparently accepted), the Connolly letter created some duty of inquiry on the part of the *Voice*, such a duty would have related solely to the *Voice's* published statements about *Vario* and *Agro* in the October 12 article, not about *Burton*.

Moreover, the Connolly letter was extremely broad and vague, and thus it could not as a constitutional matter have created a duty of inquiry of *any* kind: "[M]ere proof of

5. The decision below virtually quoted from the Connolly letter word for word: Connolly wrote that an October 12, 1972 *Voice* article contained facts which "are inaccurate, incomplete and in many cases are totally incorrect" (Petition, Appendix E, p. 16a). The court below denied summary judgment in part because the *Voice* received information from "an apparently reliable source" (not *sources*) that its original publication was "inaccurate, incomplete, and in many respects totally false" (Petition, Appendix A, p. 3a).

6. As noted above (p. 4), the October 12 *Voice* article, although it briefly alludes to *Burton*, does not—as respondent asserts in his brief—repeat the facts concerning *Burton*.

failure to investigate, without more, cannot establish reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

(2) Respondent next relies (Brief, p. 14) upon an October 12, 1972 letter to *New York Magazine* from Joseph Morello as evidence of the *Voice's* malice. Morello wrote that the assistant district attorney had consented to the release of Burton without bail, and that this fact should have been stated in the description of the *Burton* arraignment in Newfield's *New York Magazine* article. Respondent's reliance on the Morello letter as evidence of malice is misplaced. It ignores: (i) the fact that *New York Magazine* published, with the Morello letter, a reply from Newfield indicating his belief (although erroneous) that the district attorney *opposed* respondent's release of Burton without bail;[8] and (ii) that the *Voice* advertisement does not contain any reference to the prosecutor's role at the arraignment.

At most, respondent's contentions come down to a claim that the August 31 article, and derivatively the advertisement in suit, should have mentioned the prosecutor's consent to parole. But even if the August 31 article should have included mention of that consent (had the *Voice* known of the consent when the article was published), it does not follow that a brief summary of the article, such as that contained in the advertisement, need also have included

8. Newfield was informed by the bureau chief in the District Attorney's office in charge of the case that his office had sought bail on Burton's arraignment; Newfield therefore discounted Morello's contrary assertion (R. 410). It was only after this litigation commenced that Newfield and petitioners learned for the first time that, because of an administrative error at the District Attorney's office its recommendation was not communicated to the assistant district attorney who appeared at Burton's arraignment and that the assistant district attorney in fact acquiesced to respondent's suggestion that Burton be released without bail.

that fact. It is a matter of editorial judgment whether or not the prosecutor's position should have been discussed in the article. Even more clearly, in any brief summary of the article, an exercise of editorial judgment to omit such a fact is proper. Under *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), it is submitted that such an omission is at best a question of "[t]he choice of material to go into a newspaper and the decisions made as to . . . treatment of public issues and public officials—whether fair or unfair—[which] constitutes the exercise of editorial control and judgment," and accordingly cannot form the basis for a finding of knowing or reckless falsity.

(3) Finally, respondent for the first time raises in this Court portions of a report by the Association of the Bar of the City of New York (Respondent's Brief, Appendix B). But that report was not before the court below and could not have been the basis for that court's determination; hence, that report cannot be relevant in determining the correctness of the standard of knowing or reckless falsity applied below. More importantly, that report has no bearing on the issue of whether the advertisement in suit was published with knowing or reckless falsity because there is no evidence that the contents of that report were made known to petitioners prior to publication of the advertisement in suit. Respondent's brief baldly asserts (p. 16) that the report proves that on December 28, 1972, prior to publication of the advertisement, Newfield was told (and thus the *Voice* by imputation knew) that he had omitted certain "essential facts" from his *New York Magazine* article. In fact, the report says nothing more than that representatives of the Bar Association met with Newfield and

his counsel on December 28, 1972. (Respondent's Brief, Appendix B, p. 4a).[7]

In sum, respondent did not adduce any evidence of reckless or knowing falsity, and thus the court below applied a constitutionally impermissible standard—whatever that unarticulated standard was—in finding the contrary.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted and the case set down for argument. In the alternative, the petition should be granted and the case remanded to the Appellate Division for further consideration in the light of *Bigelow* v. *Virginia*, 44 L.Ed. 2d 600 (1975).

Respectfully submitted.

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7. Since respondent has chosen to go outside the record to deal with excerpts of the City Bar Association report, we would point out that the entire report concluded that Mr. Newfield's criticisms of the eight State Supreme Court Justices reviewed were confirmed by its investigation, in at least substantial part, as to five of them. Subsequently, one of the justices resigned, and removal proceedings are pending with respect to one other. In 1973, respondent Rinaldi was indicted by a grand jury on five felony counts relating to his judicial conduct, although not involving the cases reported in *The Village Voice* and *The New York Times* in 1972; two of these counts were ultimately dismissed and respondent was tried and acquitted on the remaining counts in 1974.

APPENDIX A

THE *VILLAGE VOICE* ARTICLE AUGUST 31, 1972

Norman Burton is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4000 worth of junk out of the brownstone he owns at 553A Monroe Street.

Three weeks ago, on August 8, Burton was in court. It was his 18th arrest. His five-page yellow sheet showed convictions for selling heroin, check forgery, and assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting officer $1000, and it was recorded on tape.

But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to 12-year-olds. The judge who let Burton go without any bail was Dominic Rinaldi, a Justice in Brooklyn Supreme Court.

This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.

On June 15 of this year, at a public hearing of the Joint Legislative Committee on Crime, Rinaldi was one of four city judges named publicly as being suspiciously lenient in felony narcotics cases.

Dominic Rinaldi is a loyal part of the Brooklyn political machine. He is especially close to James Mangano, who is a district leader and the chief clerk of Brooklyn Supreme Court, and who for 20 years has been a great conservative power in borough politics. His son, Guy Mangano, is also a Brooklyn Supreme Court Judge.

Despite his kindness to big heroin dealers, Rinaldi has displayed little compassion when it comes to youthful offenders, bail for poor people, or inmate rights. He has also been more anxious to sentence young drug addicts to the dungeon of Rikers Island, than to put them in narcotics treatment programs.

Says a wise political lawyer: "Compared with the good Supreme Court Judges in Brooklyn, compared with Thomas Jones, or Irwin Brownstein, or Abe Kalina,

Rinaldi is totally insensitive to civil liberties."

• • •

Last Saturday Billy David asked about the Burton case in Bed-Stuy's old, run-down 79th Precinct, at the corner of Gates and Throop. David is a black, plainclothes anti-crime cop, specializing in narcotics. He made the arrest of Burton.

"We were trying to get Norman for a month. I had arrested him once before, as he was selling a $5 bag to a 12-year-old boy. Once we staked out his house and watched 75 people buy drugs from him in two hours. I watched college girls drive up in VWs and buy heroin from him. Anyway, the first time we arrested him, he was given only $1500 bail, and he had that much in cash on him.

"It was hard to bust Norman because he almost never leaves his house, and we knew he carried a gun. We finally got him as he was bringing back 25 decks of heroin from his supplier. . . .

"A few days later, I received word that Norman wanted to see me and make a deal. I reported this to the Police Department's internal affairs division, and they had me wear a wire (concealed tape recorder) when I met with Norman.

"When I saw him, Norman offered me $1000 to drop the case by not showing up in court. At that point I arrested him for bribery."

Norman Burton's arraignment was on August 8 in Brooklyn. Billy David decided to go to the hearing because he was curious how Norman managed to get such low bail the last time.

In the middle of the hearing, Judge Rinaldi was told by Norman's lawyer that David was in the courtroom, and Rinaldi ordered David to the bench.

"The judge started to yell at me," David recalls. "He asked me what was I doing there, and then he asked me three times what bail should he set for Norman. I felt humiliated. I felt that I was nothing. The judge was yelling at me, and Norman was watching, and other defendants were watching. I couldn't even talk I felt so bad. Then Judge Rinaldi let Norman off with no bail. He paroled him in his own custody. I will never forget the tone of contempt in Rinaldi's voice as he was yelling at me. The other guy was selling heroin to children and I was being treated as the criminal."

David's commanding officer, Sergeant Tom Santise, was "outraged" when he learned what happened in court. He filed an immediate complaint with Inspector Eli Lazarus of the Criminal Justice Bureau. He also called the Brooklyn D. A.'s office to express his dismay. The D. A.'s office reassured Santise there was nothing improper about David's presence in the courtroom at the arraignment.

• • •

The Joint Legislative Committee on Crime, chaired by Republican State Senator John Hughes of Syracuse, has been investigating felony narcotics cases (a felony is possession of more than a pound of hard drugs) in which dealers have escaped jail sentences. The committee has a file on Judge Rinaldi.

Clifton Glover is a heroin dealer on about the same scale of operation as Norman Burton—considerably above the typical street corner addict-pusher. Glover was

arrested on May 20, 1970, in Brooklyn for selling narcotics. An undercover cop made a buy and then arrested Glover. Glover had on him two ounces of heroin, almost a pound of cocaine, and a loaded gun. He had two prior arrests for selling drugs, and was free on bail at the time of his arrest.

On October 28, 1970, Clifton appeared before Judge Rinaldi. He pleaded guilty, and received a conditional discharge—no sentence. He could have received up to 25 years. According to John O'Connor, the executive director of the Joint Committee on Crime, "a conditional discharge for a C felony is prohibited under the state's penal law."

In December 1971, the Joint Committee released a study of court dispositions of felony narcotics cases. The study revealed that in Brooklyn only six per cent of major narcotics dealers are sentenced to a year or more in prison. This compares with 31 per cent in the Bronx and 28 per cent in Queens. The same survey disclosed that 42 per cent of felony narcotics cases in Brooklyn were dismissed, compared with only 15 per cent in the Bronx.

* * *

Two related poisons are eating away at New York—the plague of heroin, and the corruption of the criminal justice system caused by the billion dollar economy of junk. After reading the Joint Crime Committee's studies, and the State Commission of Investigation's annual report released two weeks ago, it seems clear that the most dangerous corrupters of justice in this town are not the cops on the beat, but those who are more powerful and respectable—the judges and the prosecutors.

The State Commission's report devoted 32 pages to describing how the Queens District Attorney's office and Judge Albert Bosch let a heroin dealer plead guilty to a misdemeanor and go free.

Heroin kills. It causes crime, it destroys neighborhoods, it makes citizens flee to the suburbs or live in fear behind triple locks. A child a week dies in this city because of the negligence of drug-addicted parents. Eighty per cent of the inmates in the over-crowded Tombs are junkies. More than half the 58 homicides during the week of July 14 involved heroin. The economy of junk is what organized crime is all about. And the immense profits of heroin corrupt the rule of law itself.

There are at least 250,000 heroin addicts in New York City. Nobody knows for sure, just as nobody knows for sure exactly how many rats are in the slums. It is estimated by Max Singer of the Hudson Institute that in New York State addicts steal a half billion dollars annually to maintain their habits.

So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. Just look at Fox Street in the South Bronx, or Myrtle Avenue in Bed-Stuy, and you can see the process of generational genocide caused by heroin. Ten-year-olds dead of ODs in abandoned buildings and alleys. Storekeepers murdered by addicts desperate for a fix. Old junkies dead at 30 with no veins left.

Thanks to David Durk, Frank Serpico, David Burnham, and the Knapp Commission, police corruption has been exposed to public scrutiny. Norman Burton was not just a heroin dealer. He tried to bribe a cop, and the cop reported it, and took some risk to make an additional arrest for bribery. What Billy David did was exemplary. But Judge Rinaldi abused him and let the briber go free. What effect will the example set by Judge Rinaldi have on cynical cops tempted by graft?

Billy David is not affluent. He lives in Canarsie and probably earns less money than most readers of The Voice. Norman Burton, the dealer, probably makes $100,000 a year; he owns two houses. Billy David should have been honored for arresting Norman Burton. Instead Judge Rinaldi made him feel like a criminal.

Billy David and other good cops are society's garbagemen. They do the shit work and take risks no one else wants. Billy David isn't responsible for the poverty and violence of Bedford-Stuyvesant. He didn't build the rotten housing, or cause the unemployment, or bring in all the narcotics and knives, or spread the veneral diseases, or breed the rats. He didn't build Bedford-Stuyvesant; the banks, and the real estate speculators, and the politicians did that. Billy David just goes out every night and tries to protect people from muggers and robbers, and tries to lock up the heroin dealers.

Unlike most of us, he gets to see the victims—the pain of a mother whose son is strung out on junk, the old person killed for $2, a welfare recipient whose check has been stolen, the ODs still in public school. And in the 79th Precinct all the victims are black.

* * *

Nobody judges the judges. A Supreme Court Justice like Dominic Rinaldi is literally beyond the law. He is a king without accountability. As long as he pleases James Mangano, he will remain a judge. And you and I will have to stand in respect every time he enters and leaves his courtroom.

APPENDIX B

THE *VILLAGE VOICE* ARTICLE OCTOBER 12, 1972

During the last 18 months, five criminal indictments against Mafia members in Brooklyn have been thrown out of court by the trial judge. All five were later unanimously reinstated by the Appellate Division. And all five dismissals were ordered by the same Brooklyn Supreme Court Justice —Joseph Corso.

Joseph Caruso, an alleged soldier in the Carlo Gambino Mafia family, was indicted for contempt in Brooklyn. On March 1, 1971, Caruso pleaded guilty before Judge Corso. On September 29, 1971, in a highly unusual procedure, Judge Corso permitted Caruso to change his mind, withdraw his plea, and then dismissed the indictment against him. On June 12, 1972, the Appellate Division reversed Corso's decision in a 5-0 ruling

On September 15, 1972, Judge Corso set Caruso plead guilty again, and fined him $500. According to a witness in court that day: "By the time Corso said the word 'five,' Caruso had the money, five new $100 bills, out of his pocket, and handed it over."

Vincent De Cicco, listed by police as a button man for the Gambino family, was convicted of contempt of a Brooklyn grand jury on September 24, 1971. Judge Corso threw out the jury's verdict and dismissed the indictment. To his considerable credit, Brooklyn District Attorney Eugene Gold appealed Corso's ruling, as he appealed all five of these curious Corso dismissals. And the Appellate Division unanimously reversed Judge Corso, restoring the guilty decision and reinstating the original indictment.

On June 1, 1972, De Cicco came before Judge Corso for sentencing. Prior to the sentencing date, Brooklyn D. A. Gold sent Judge Corso a written recommendation from the Probation Department that the defendant be sentenced to the maximum, a year in jail, based partly on the fact that De Cicco's criminal record began in 1931 and included a conviction for robbery. But Judge Corso imposed only a three-month sentence.

In this case Judge Corso admits he spoke to the Probation Department and says he was given a recommendation fr a more lenient ntence. But Judge Corso has refused to say who in the Probation Department he spoke to. And a Probation Department employe told me: "I don't believe anyone here would have recommended leniency for a guy like De Cicco. We believe Judge Corso asked that the report be changed himself. And although Judge Corso can probably cite some legal justification for his decision, I will always be suspicious of him becase of his special zeal in this case. He went out of his way to help De Cicco."

Bruno Capio is listed as a soldier in the Bonanno family. His contempt indictment was dismissed by Judge Corso on November 9, 1971, and was reinstated, on the District Attorney's appeal, on April 10, 1972. The case is still pending in the Brooklyn courts.

Aniello Dellacroce is one of the major figures in organized crime, regarded as the underboss of the whole Carlo Gambino family. His contempt indictment was thrown out by Judge Corso on February 2, 1971, and then unanimously reinstated by the Appellate Division on February 7, 1972.

Angelo Sparaco is listed by law enforcement agencies as a capo in the Bonanno family. Judge Corso dismissed his indictment on June 7, 1971, and the Appellate Division unanimously reinsteated the indictment on May 15, 1972. The case is still pending.

Judge Corso's extraordinary permissiveness toward the Mafia is inconsistent with his treatment of other defendants. And inconsistent with his record while he was an assemblyman.

Dan Alterman, an attorney affiliated with the Lawyers Guild, tells this story of his experience before Judge Corso: "I had a client, a black kid, 19 years old. He was in the hospital, on the critical list, as the result of a fight on the street. While he was in the hospital, he obviously was unable to report to his probation officer. We appeared before Judge Corso on a violation of probation charge. Judge Corso wouldn't even listen to us. He told my client, 'You deserve to be put away,' and sent my client back to prison."

Corso's record as an assemblyman is undistinguished, except for one bill he would introduce every session of the legislature. The Corso bill would permit public school teachers to hit students, to use "reasonable force."

In 1957 the bill was vetoed by Governor Harriman, and in 1959 and again in 1960 Corso's corporal punishment bill was killed by Governor Rockefeller, after the New York Board of Education and the Herald Tribune urged its veto.

* * *

The Joint Legislative Committee on Crime, chaired by Republican John Hughes of Syracuse, has been compiling statistics on the quality of justice in the courts. The facts suggest there is something rotten in the judiciary, particularly in Brooklyn.

According to the Hughes Committee's records, Mafia members and big-time heroin dealers are systematically treated more leniently than other defendants.

In New York City, 44.7 per cent of indictments against organized crime figures during the last 10 years were dismissed by State Supreme Court Justices. In contrast, only 11.5 per cent of the indictments against all defendants were dismissed. In 193 cases where Mafiosi were actually convicted by a jury, the study showed that the trial judge let the defendants off with no prison sentence 46 per cent of the time.

Another study prepared by the Hughes Committee staff showed that major heroin dealers are treated more permissively by

judges in Brooklyn than in any other county in the city.

Only six per cent of the heroin dealers charged with a felony (possession of more than a pound of heroin or cocaine) received more than one year in prison from Brooklyn judges. In contrast, 31.6 per cent of the felony heroin defendants in the Bronx were sentenced to more than a year in prison.

Also, 42 per cent of the felony cases against heroin dealers were dismissed by Brooklyn judges, while only 15 per cent of such cases were thrown out by Bronx judges.

The point I'm trying to suggest is definitely not that all judges should become tougher on all defendants. In selected areas—like heroin traffic and organized crime—I think judges should clearly be less permissive. But at the same time, in other areas—sentencing first offenders, considering alternatives to detention, setting bail for poor people, handling addicts who are not large-scale pushers—in these areas, judges should be more flexible and more compassionate. The problem now is that some judges have completely reversed the areas where toughness and sensitivity are required, so that the law has a double standard—one for the underboss of the Carlo Gambino family, and another for a black kid from Bed-Stuy on probation.

• • •

Dominic Rinaldi is another Brooklyn Supreme Court judge with a twisted sense of justice. Six weeks ago I wrote a Voice article describing two cases involving heroin dealers where Judge Rinaldi let them both go free without a jail sentence ("Justice Gets a Fix," Voice, August 31). One dealer had 12 previous arrests and was arrests and was arrested selling to a 12-year-old. The second drug pusher could have gotten 25 years on a C felony, and Judge Rinaldi gave him a conditional discharge.

Two weeks ago in the New York Times, Nicholas Gage reported two other cases where Judge Rinaldi was suspiciously lenient with members of the Mafia. One case involved Paul Vario, a captain in the Mafia family headed by the late Thomas Luchese. Vario had a criminal record dating back to 1925, including a conviction for rape. He was charged with bribery and conspiracy and could have gotten 15 years in jail. But Judge Rinaldi only fined him $250.

The other case reported by the Times involved Sal Agro, a Mafioso who was indicted for grand larceny and forgery. Agro pleaded guilty and was given a

suspended sentence by Judge Rinaldi.

Judge Rinaldi justified his leniency with Agro on the grounds that the defendant did not have a previous record. But, in fact, Agro did have a previous criminal record. On March 6, 1953, Agro was sentenced to a year in prison for his role in a heroin-selling conspiracy.

My investigation has now disclosed a fifth case where Rinaldi's judgment is in serious question. This case, like the two Mafia cases, took place in Suffolk County, where Rinaldi sits six months a year, even though he was elected in Brooklyn.

Richard Di Napoli, a former assemblyman, was the Recreation Commissioner for the town of Babylon, when he was indicted for grand larceny of political funds. He won several adjournments, and finally arranged for a non-jury trial before Judge Rinaldi in October 1970. Rinaldi acquitted Di Napoli.

Last week an assistant Suffolk County district attorney talked (not for attribution) about Judge Rinaldi:

"The Vario and Agro cases still stink. And we still believe Rinaldi's not guilty decision in the Di Napoli case was bad. We did not follow Judge Rinaldi's logic. We had a good, strong case against Di Napoli. . . . A lot of mob guys just stall their cases and wait for Rinaldi to come out here in June, and then he goes easy on them. We wish he would stay in Brooklyn. He comes out here and does things no local judge would dare do. It's a bad situation, but we can't do anything about it."

Judge Rinaldi gets paid $50 a day extra—above his $41,000 salary—by the taxpayers to sit in Suffolk County, when the assignment is actually a favor to him because of a home he owns near Islip.

Judge Rinaldi is up for re-election in 1974.

* * *

Last week I talked to a federal prosecutor, one of several law enforcement officials currently investigating the criminal justice system in New York City.

"Brooklyn is the worst," he said, "a special case for several reasons. One, the mob has always had deep roots in Brooklyn the Gallos, Colombos, and the Gambino family particularly. Second, as the Knapp hearings showed, there is a long history of police corruption in Brooklyn. Third, the Brooklyn Bar Association is really venal, and has never helped in keeping the courts clean. And fourth, there is no tradition in Brooklyn of keeping politics out of the courts. The machine gets most of its patronage from the courts. Personally, as a prosecutor, I will not take an organized crime case into Brooklyn Supreme Court. There are too many contract judges there. Carlo Gambino can probably influence more judges there than the D. A.'s office."

In fairness, it should be pointed out there are also some excellent Supreme Court judges in Brooklyn. Irwin Brownstein, a protege of County Leader Meade Esposito, is remarkable for his knowledge of the law and his commitment to equal justice. Brownstein has taken defendants to his own home for dinner, and has spent hours of his own time trying to find jobs for paroled first offenders and ex-cons. Abe Kalina, Vincent Damiani, and Tom Jones are also highly qualified Brooklyn Supreme Court judges.

* * *

The problem in Brooklyn is not one or two individual villains, but the whole rotten, century-old system that mixes clubhouse politics and patronage with the majesty of the Constitution and the dignity of the law.

There are 46 Supreme Court judges, each serving 14-year terms, in the Brooklyn-Staten Island Judicial District. All but four were elected with the endorsement of both the Democratic and Republican parties. And more than half—including Rinaldi and Corso—were elected with the endorsement of three political parties.

The public never had a real voice in their election. And the legal profession never had a real voice in their nomination. They were all nominated in judicial conventions, tightly controlled by district leaders. And elected in deals between party leaders that guarantee no opposition. They are politicians picked for political reasons. They owe everything to the political organization. Legal excellence or distinction have little to do with the entire process. They can't even pick their own staff—the party organization does that.

In 1971, two Supreme Court judges were elected in Brooklyn, and both had Democratic and Republican support. In 1970, six Supreme Court judgeships were open in Brooklyn. Five Democrats and one Republican were picked, and all six had bi-partisan endorsement—and no serious opposition. In 1968, in the Brooklyn-Staten Island judicial district, 19 new judgeships were available, and all 19 candidates received the endorsement of the Democratic, Republican and Liberal parties.

There are $1 million worth of patronage jobs in the Brooklyn courts, and many of these jobs are controlled by a 66-year-old mortician named James Mangano. Mangano has been a district leader in Red Hook since 1934, and has been general clerk and administrative director of Brooklyn Supreme Court for two decades. He is largely responsible for both Joseph Corso and Dominic Rinaldi getting judgeships, and for his son, Guy Mangano, becoming a Supreme Court judge in Brooklyn.

It is estimated that James Mangano personally controls about 100 jobs in the Brooklyn courts—judgeships, law secretaries, confidential attendants, clerks, court reporters, court officers, probation officers, and typists. Although he never went to law school, Mangano has made about 10 of the current Supreme Court judges in Brooklyn.

Mangano is a hard-line conservative on social issues, and his Captains have quietly been working for Richard Nixon's election this autumn.

All but seven of Brooklyn's 46 Democratic district leaders hold patronage jobs, most of them

somewhere in the court system. Mangano is general clerk of Supreme Court. Frank Cunningham, Jr., the district leader of Congressman John Rooney's home club, is chief clerk of the Supreme Court's Appellate Term in Brooklyn. Casper Fasullo, another powerful district leader, is a law assistant in the Surrogate's Court. District leader Joseph Levine is a law secretary. District leader Joseph Sciarra is also a law secretary.

In addition, the *Republican* state committeemen from seven different assembly districts hold patronage jobs in the Brooklyn courts, including Joseph Parisi, chief clerk of the Criminal Court; Nicholas Nittoly, deputy clerk of the Criminal Court; and Anthony Durso, clerk of the Supreme Court.

Such a rich and political court system has traditionally been a fertile ground for corruption—whether political contracts, personal favors, or organized crime pay-offs. Maurice Nadjari, the Governor's special prosecutor, summarized the process this way: "Our judges come up through political organizations, and build up obligations along the way. At the same time, racketeers cultivate political figures, and when their people get into trouble, they try to use whatever influence they have. This influence is not going to be stopped completely until we separate justice from politics."

* * *

Meade Esposito has been county leader of Brooklyn since January 1969. Last Tuesday I had lunch with him in Foffe's Restaurant on Montague Street in Brooklyn, and asked him about the courts. He sounded like half a reformer himself.

"The whole system stinks," Esposito began. "The 14-year term for Supreme Court judges is too long. I'm for eight-year terms, and then let an impartial committee of lawyers and community people have the power to re-appoint them every two years if they're doing a good job. If not, then get rid of them. But they should be reviewed every two years."

Esposito does not favor a direct primary for Supreme Court judges, "because it would cost too much." "If there was a primary, then all the judges would be rich boys from Harvard and Yale. I like some judges to come from Brooklyn College. And in this county you would never elect a member of a minority community to the count. This way we got someone like Tom Jones on the Supreme Court. . . .

"One reform I would favor is that every judge must live in his community. In Brooklyn we got a couple Supreme Court judges who moved right out to Long Island as soon as we made them. I want my judges to be involved in the life of the neighborhood. I want them in the clubhouses, where the people can see them. Not out in Riverhead someplace."

What about the practice of the party organization picking the law secretaries? Esposito believes in that kind of patronage. "What's wrong with the party appointing the law secretaries? You gotta reward the faithful. But I make sure they work, or else they're fired."

I asked Esposito about the general low reputation of the courts, and the appointment of Maurice Nadjari as the special prosecutor.

"Yeah, I'm in favor of the superseding D. A. I know there's some decay in there. I say, let it fall wherever it falls. We have to clean it up. . . . Sure, there might be some contracts in the courts. But all this stuff about selling judgeships is a lot of crap. I defy anybody to say he gave me a dime for a judgeship."

What can you do about the bad judges?

"You prove something to me, and we'll get rid of them. There's one judge in Brooklyn Civil Court I'll tell you right now, I will oppose for re-nomination—Ross Di Lorenzo. He's bad. He was district leader and nominated himself in 1964. I will tell all my leaders to dump him in 1974."

* * *

Each year a few good politicians deliver thoughtful speeches on the need for court reform. And then nothing happens.

In 1966, Robert Kennedy, campaigning to elect Sam Silverman the Manhattan Surrogate, briefly ignited public interest in the cause of reform. Over the years Mayor Lindsay has made several excellent speeches calling for the appointment of all judges on a merit system, based on the recommendation of impartial screening committees. For the last two years, Lindsay has also proposed the creation of a permanent commission with a full-time staff to receive and investigate lawyer and citizen complaints against judges. Board of Corrections Chairman William vanden Heuvel has also made many free speeches listing most of the things that ought to be done to redeem the courts—greater productivity, stricter supervision, less political selection, better administration.

But reasonable, polite speeches do not transform powerful, self-important institutions like the courts. The years of accumulated rot in the court system requires stronger remedies.

There is by now abundant evidence of terrible judgment, doubtful ethics, and possible corruption among some judges. The sentencing statistics collected by the Hughes Committee, the Knapp Commission report, the recent articles in the Times and The Voice, all have helped expose the essential facts of unequal justice to public scrutiny. But no one seems willing to accept responsibility for taking the next step beyond exposure.

A critical newspaper article is hardly sufficient punishment for a judge who unnecessarily sends a heroin dealer back into this city's communities of suffering. A day's embarrassment is hardly an adequate deterrent to a judge who wants to accept a contract from the Mafia, which is, after all, the General Motors of the heroin business.

The time has finally come, I think, for the courts to clean their own house, and remove judges like Dominic Rinaldi and Joseph Corso from their positions of immense power and prestige.

There are three possible mechanisms for removing judges. One is criminal indictment, which seems remote at this point, since there is no proof money changed hands in these cases.

A second possible removal mechanism is impeachment by the state legislature. This also seems unlikely.

A third way, and the most plausible, would be a trial on competency grounds by a judicial court. A judicial court can be convened by the Judicial Conference, which consists of all the Administrative Judges in the New York area. A judicial trial had been scheduled for Manhattan Supreme Court Judge Mitchell Schweitzer, when Schweitzer resigned last year.

I believe there is now a sufficient pattern of incompetent decisions by Judges Rinaldi and Corso to justify the rare spectacle of a judicial trial.

APPENDIX C

THE NEW YORK TIMES ARTICLE SEPTEMBER 25, 1972

STUDY SHOWS COURTS LENIENT WITH MAFIOSI

Racketeers Found 5 Times Less Likely To Be Convicted in State Than Others

By Nicholas Gage

On Sept. 8, 1967, Paul Vario, who is listed by the Justice Department as a captain in the Mafia family of the late Thomas Luchese, pleaded guilty before Supreme Court Justice Dominic S. Rinaldi to commercial bribery of a police officer.

Vario, whose criminal record dates back to 1925 and includes a conviction for rape, could have been given up to a year in jail. Instead, Judge Rinaldi fined him $250.

On the same day Justice Rinaldi sentenced Luis Guzman, 19 years old, up to five years at Elmira Reformatory for robbing a drugstore in Huntington, L.I.

Vario is not the only Mafioso who has fared better than ordinary defendants in New York State courts.

1,762 Cases Studied

Last year the State Joint Legislative Committee on Crime conducted a study of 1,762 cases in state courts in the years 1960 through 1969 involving organized crime figures, including Vario.

The committee, whose chairman is Senator John H. Hughes of Syracuse, found that the rate of dismissals and acquittals for racketeers was five times that of other defendants.

In New York City, 44.7 per cent of indictments against members of organized crime were dismissed by Supreme Court judges during the 10-year period. Only 11.5 per cent of indictments against all defendants were dismissed, according to the study.

In 193 instances where organized crime figures were actually convicted, the study showed that judges let the defendants off with suspended sentences or fines in 46 per cent of the cases.

A Swindle in Brooklyn

In order to determine some of the factors in the wide discrepancy between the treatment of racketeers and ordinary defendants in the courts, The New York Times during the last six weeks has investigated the handling of several of these cases as well as more recent ones that have come before state courts in the metropolitan area.

One case in which an organized crime figure fared well in court involved an imaginative swindle that netted over $1-million during a six-week period in 1963. Counterfeit checks of Mays Department Store in Brooklyn were made out to fictional suppliers of Mays at banks where swindlers had previously established accounts for the bogus suppliers.

Seven persons were indicted in the swindle on charges of grand larceny and forgery. One of the seven, Salvatore Agro, was connected to the Mafia. According to informa-

tion from investigations of the principals involved in the swindle, the person who devised the scheme, Herman Witt, borrowed $30,000 from a Mafia lieutenant to start the bank accounts used to cash the counterfeit Mays checks, and Agro was assigned to look after the investment.

In 1966, all seven defendants pleaded guilty to lesser charges before Justice Rinaldi, the same judge who had fined Vario, and he sentenced six of them to prison terms. Agro, the reputed Mafioso, was given a suspended sentence by Judge Rinaldi and walked out of the courtroom a free man.

In a telephone interview last week, Justice Rinaldi, who has been on the Supreme Court, Second District, since 1962, was asked about the sentencing of both Agro and Vario.

He said he could not remember the Vario case at all, which came before him while he was sitting in Suffolk County rather than in Brooklyn, his regular assignment. "I must have handled 200 cases for them out there that year," he said. "I don't remember any of them."

Agro Case Remembered

The judge said he did remember the Agro case. "There were several defendants in that one and I gave all of them but Agro time," he said. "His charge was reduced to a misdemeanor, which the prosecution went along with, and the probation report showed no previous record for him."

The assistant district attorney in charge of the case, Edward Panzarella, apparently concurred with the judge's decision. He later signed a report saying that the pleas "in each instance are recommended and the sentence will in all respects be adequate."

He said in the report that Agro was "the least culpable" of the defendants. "Salvatore Agro is 38 years old and has no prior record," Mr. Panzarella wrote.

However, during the police investigation of the case, detectives taped conversations between Witt, who devised the swindle, and Agro. In those tapes, which were made available to Mr. Panzarella, Agro stated that he was fully involved in the swindle and that he was close to leading Mafiosi in New York.

"First of all, the people, the big people in New York, knew about this score, the Mays score . . . ." Agro told Witt in one of the tapes "They financed—gave me the money—for this [obscenity] thing."

Moreover, The Times discovered in the course of its investigation that, contrary to what Mr. Panzarella said in his report, Agro did have a previous record.

The files of the Federal courthouse in Buffalo show that on March 6, 1953, Agro pleaded guilty to conspiracy to deal in narcotics and received a year's sentence.

Mr. Panzarella is no longer with the Brooklyn District Attorney's office. He resigned after it was disclosed that he had failed to prosecute a city correction officer arrested with more than $200,000 worth of cocaine. He could not be reached for comment.

The Agro case illustrates that in some instances lenient treatment given organized-crime fighters by a judge is approved by the prosecutor involved. But even when the prosecutor resists such treatment, racketeers can wind up doing very well in the courts.

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